

**HAMILTON COUNTY MUNICIPAL COURT
HAMILTON COUNTY, OHIO
CRIMINAL DIVISION**

STATE OF OHIO

} Case No. 20 CRB 10345

Plaintiff,

} Judge Ted N. Berry

-vs-

MULAMDA KALUBI

} DEFENDANT'S MOTION TO DISMISS

Defendant.

}

Comes now the Defendant, pursuant to Crim. R. 12, and hereby moves this Court to dismiss the Complaint. The grounds for this Motion are more fully set forth in the attached Memorandum in support.

/s/ Samuel Heller

Samuel Heller (0099208)

Law Office of the Hamilton County Public Defender

230 E. Ninth Street

Cincinnati, Ohio 45202

(513) 946-3720

/s/ Jennifer M. Kinsley

Jennifer M. Kinsley (0071629)

P. O. Box 19478

Cincinnati, Ohio 45219

/s/ H. Louis Sirkin

H. Louis Sirkin (0024573)

J. Robert Linneman (0073846)

John D. Holschuh, III (0095377)

Santen & Hughes

600 Vine St., Suite 2700

Cincinnati, OH 45202

(513) 721-4450-ph

hls@santenhughes.com

jrl@santenhughes.com

jdhiii@santenhughes.com

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Attorneys for Defendant

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On Memorial Day, 2020, Minneapolis police were recorded killing George Floyd, an unarmed African-American man. Several months earlier, Louisville police had shot and killed Breonna Taylor, an unarmed African-American woman and an EMT, in her bed as she slept. Around the same time, video emerged of the point blank shooting of Ahmaud Arbery, who had been killed by three white men who had not then been charged with a crime despite video evidence of the killing. These three killings exacerbated, reignited, and spread collective outrage at racism—and specifically racist policing and brutality. In the wake of Floyd’s death, people across the country and around the world began demonstrating to demand justice and change.

Demonstrations began in Cincinnati on or about Friday, May 29, 2020. Through the daylight hours and into the night, people gathered at government buildings, in parks, and on the streets and sidewalks chanting, singing, carrying signs, and interacting among themselves, with passersby, and media, even stopping traffic at times. Later that night, there were reports of property damage around the City, and numerous arrests were made.

A. The First “Emergency Order”

The next day, on May 30, 2020, Cincinnati’s Mayor, John Cranley, released an “Emergency Order.” (Attached at Exhibit A) (“Emergency Order”) In that document, the Mayor claimed that there was an “emergency declaration currently existing in the City of Cincinnati, which declaration pursuant to Article III of the City Charter was approved by the City Council...” The Emergency Order did not annex a copy of the purported emergency declaration, nor did it contain a copy of an ordinance or other evidence of approval by Council. According to the published minutes of Council, its last meeting prior to that time had been on May 28, 2020,

and those minutes contain no indication of any declaration of emergency on account of demonstrations.

The Emergency Order contained the Mayor's order for "implementation of a curfew from 10 p.m. to 6 a.m. in designated neighborhoods of the City of Cincinnati." ("Curfew") The Emergency Order further provided that:

Individuals are prohibited from appearing in the public spaces of the City of Cincinnati neighborhoods of Over-the-Rhine, the Central Business District/Downton, the Banks, and the West End during the period of the curfew. This Order is inapplicable to the City of Cincinnati officials, members of the public safety forces, emergency personnel, health care professionals, essential workers, people experiencing homelessness and local government officials engaged in their lawful duties.

(See Exhibit A)

Demonstrations resumed on May 30, 2020 nonetheless. Despite the lawful and nonviolent nature of the overwhelming majority of those in attendance, Cincinnati police and other law enforcement officers at various times deployed tear gas, pepper spray, pepper pellets, flashbang grenades, and other "non-lethal" projectiles, at times deploying the same against or in the vicinity of disabled persons, children, passersby, or others not involved in the demonstrations.¹ Police began physically arresting people shortly after 10:00 p.m.

B. The Second "Emergency Order"

After numerous arrests on May 30, the Mayor issued a second "Emergency Order" on May 31. (See Exhibit B) ("Second Emergency Order") The Second Emergency Order used identical language, but modified the original Emergency Order in important respects. First, the Second Emergency Order extended the hours of the Curfew by one hour, imposing the restriction

¹ Amnesty International cited the enforcement of the Curfew in Cincinnati as one example of "egregious human rights violations" committed by law enforcement during the recent protests over the George Floyd killing. (<https://www.amnesty.org/en/latest/news/2020/06/usa-end-unlawful-police-violence-against-black-lives-matter-protests/>)

from 9:00 pm through 6:00 am. In addition, the Second Emergency Order extended the geographic area of the Curfew to the entire City of Cincinnati, whereas the original Emergency Order had been limited to just four neighborhoods.

Lawful demonstrations again convened on May 31 in various areas of the City despite the prior night's arrests. Police continued to deploy tear gas, pepper spray, pepper pellets, flashbang-grenades, and other "non-lethal" projectiles against demonstrators throughout the day. Outside the Hamilton County Courthouse, at approximately 8:45 pm, police deployed large volumes of tear gas into a crowd of demonstrators, and thereafter arrested over one hundred persons in a single site, many of whom were detained on and ultimately transported on Cincinnati Metro busses.

C. The Third "Emergency Order"

Despite rampant police violence and hundreds of arrests, the lawful demonstrations continued. As the days passed, the number of arrests tapered. On June 3, 2020, the Mayor issued yet another order extending the Curfew (See Exhibit C) ("Third Emergency Order") In the Third Emergency Order, the Mayor continued to impose the Curfew over the entire City, extending it until June 8, but reduced the hours of the Curfew from 11 pm through 6 am.

D. The Defendant's Arrest

Defendant was charged with Misconduct at an Emergency under Ohio Rev. Code 2917.13. The offense is a fourth-degree misdemeanor; however, "[i]f a violation of this section creates a risk of physical harm to persons or property, misconduct at an emergency is a misdemeanor of the first degree." *Id.*

Defendant was charged with a misdemeanor of the first degree under a complaint executed by a "processing officer" who apparently was not present at the arrest. The complaint is identical in language to the complaints filed against hundreds of other persons charged with

violation of the Curfew. The Complaint provides no description of the facts of the purported offense, nor does it provide any description of conduct that created any risk of physical harm to persons or property. The blanket allegation of the Complaint contains a recitation of the curfew order's time period on the date Defendant was arrested, and further states:

The order was issued through widespread media dissemination. The purpose of this emergency declaration was to abate the destruction and violence associated with illegal rioting in response to law enforcement personnel. In the late hours of May 29, 2020, through the early hours of May 30, 2020, rioters destroyed property, looted businesses, and attacked Cincinnati Police officers.

The arrested individual identified above was found by Cincinnati Police to be violating the curfew order. The arrested was ordered by Cincinnati Police to leave the property. The arrested individual refused to comply with the lawful order to leave the area. The curfew order was in response to and declared under emergency conditions. Violating the curfew order further creates/prolongs the emergency situation created by ongoing risk of illegal violence and property damage.

See Complaint. As will be shown below, the charge of Misconduct at an Emergency which has been lodged against the Defendant is invalid and deficient in numerous ways and should accordingly be dismissed as a matter of law.

II. LEGAL ARGUMENT: THE COURT SHOULD DISMISS THE PENDING CHARGES AGAINST DEFENDANT.

A. The Mayor's Curfew Order Constitutes an Invalid Ultra Vires Act under State and Local Law and Violates the Doctrine of Separation of Powers.

The curfew that is the source of the alleged crime in this case is unenforceable because it is not supported by an underlying emergency declaration. A declaration of an emergency is a strictly legislative function under the Cincinnati City Charter and the Ohio Constitution, and there is no public record of a declaration of emergency resulting from the May 29th demonstrations.

1. The power to declare an emergency is vested exclusively in City Council.

Cincinnati is a “Charter City,” and the structure and powers of its government are provided for by the Charter. This form of government derives its authority from the Ohio Constitution:

Any municipality may frame and adopt or amend a Charter for its government and may, subject to the provisions of Section 3 of this article, exercising under all powers of local self-government.” (Ohio Constitution, Article XVIII, Section 7).

Under the Charter, the power to declare an emergency is granted solely to the City Council in explicit terms:

Emergency ordinances upon a yea and nay vote must receive the vote of a majority of the members elected to the council, and *the declaration of an emergency and the reasons for the necessity of declaring said ordinances to be emergency measures shall be set forth in one section of the ordinance, which section shall be passed only upon a yea and nay vote of two-thirds of the members elected to the council upon a separate roll call thereon.*

City Charter, Article II, Section 3 (*emphasis added*).

The provisions for “emergency powers” within the City Charter establish both a separation of powers between the branches of government and limitations upon emergency powers. First, any time that the City government seeks to act via emergency powers, the Charter requires a roll call vote. This requirement inherently creates accountability since the Charter separately requires the Council to conduct its business in open meetings and to record the votes of its members. (See Charter, Art. II, Section 5) Second, the Charter requires the vote of a supermajority of Council. Finally, any emergency declaration must explicitly state the reasons for the necessity of emergency action. Thus, the Charter permits emergency action to take effect only when the need for urgent action is clearly articulated by Council and when two-thirds of its members have voted in public in favor of the action.

The language of the Charter on this subject is nearly identical to language of the Ohio Revised Code defining the power of the legislature of a municipal corporation. See ORC §

731.30. The structure for emergency action in the Charter is also mirrored in Council's own rules. Council Rules 9.6 and 9.7 outline specific procedures for passage of emergency ordinances consistent with the provisions of the Charter.

Article III of the Charter, governing the Mayor, does nothing to modify this intentional division of powers. There is one sentence in Article III which deals with the Mayor's emergency powers:

In time of public danger or emergency, the Mayor may, with the consent of the Council, take command of the police, maintain order, and enforce the law.

Under this section, any powers granted to the Mayor depend in the first place upon the existence of an emergency. As established by the previous Article of the Charter, only Council may declare an emergency. Second, even after an emergency declaration, these Mayoral powers require the consent of Council, which must presumably be in the form of an ordinance. Nothing in Article III of the Charter grants to the Mayor the independent power to declare an emergency.

2. *The public records of City Council do not evidence any emergency declarations that authorize the Curfew.*

The May 30 Emergency Order states specifically that "the need for the Order arises from destruction and violence in several areas of the City of Cincinnati on May 29, 2020 through May 30, 2020."² Therefore, any emergency declaration in response to destruction and violence that occurred on May 29 necessarily must have been issued sometime after May 29. However, a review of the public agendas and minutes of the Clerk of City Council shows that as of May 30, the last meeting held by Cincinnati City Council was on May 28. (<https://www.cincinnati-oh.gov/council/meeting-agendas-minutes/council-minutes/>) (See Exhibit D) These minutes make clear that Council did not vote on an emergency declaration at the May 28 meeting. The next

² The Second and Third Emergency Orders recite that "destruction and violence" continued past May 30 despite the Curfew.

succeeding meeting did not occur until June 10, by which time the Curfew had ended. Thus, City Council could not have voted on an emergency declaration at any time between May 29 and June 1, nor could it have “approved” of one, as alleged in the Emergency Orders, simply because it did not meet during that time.³ Accordingly, without an emergency declaration, the Mayor lacked any power to impose a Curfew.

3. *The City may not rely upon a provision of the Administrative Code to vest the Mayor with authority to declare an emergency.*

The City apparently relies upon the Cincinnati Administrative Code (“CAC”) in order to invoke the Mayor’s power to impose the Curfew. However, the CAC cannot delegate to the Mayor a power explicitly vested in Council by the Charter.

The primacy of the Charter as the source of governance in the City is established within the Charter itself, and in its first sentences:

The city shall have all powers of local self-government and home rule and all other powers possible for a city to have under the constitution of the state of Ohio... *All such powers shall be exercised in the manner prescribed in this charter, or if not prescribed herein, in such manner as shall be provided by ordinance of the council.*

Charter, Article I (*emphasis added*).

The Charter is to the City as the Constitution is to our nation. It is the foundation, and also the source of any law that is later established by Council and the Mayor. Accordingly, neither Council nor the Mayor may establish any law that would contradict the Charter. They may do so only concerning matters “not prescribed [t]herein.”

It is the Charter that creates the CAC, and within that provision, the Charter establishes the CAC’s limited purpose:

³ If Council did somehow provide its consent or approval outside of formal proceedings, such action may be in violation of other law, as will be explained below.

The Council shall maintain an Administrative Code providing for complete plan of administrative organization of the city government. Thereafter, except as established by the provisions of this Charter, the Council may change, abolish, combine and rearrange the departments divisions and boards of the city government provided for and said Administrative Code...

(Cincinnati City Charter, Article 2, Section 7).

Thus, the very existence of the CAC is derived from the text of the Charter, and the Charter authorizes the CAC solely to provide a “plan for administrative organization.” This administrative mandate could in no way become a means for the executive branch to take on a power specifically given to the legislative branch within the Charter.

Nonetheless, provisions of the CAC have apparently fostered confusion on this point, as urged by the City. CAC Article XVIII, Sections 5, 6, and 7 authorize the Mayor, Vice Mayor, or City Manager (as the case may be) to issue a declaration of emergency, to take command of the police, and to undertake other emergency powers including the ordering of a curfew. However, to the extent that these provisions of the CAC are deemed to permit the Mayor, Vice Mayor, or City Manager to independently declare an emergency in the City, they directly contradict Article II, Section 3, and are therefore ineffective. In any case where the CAC contradicts a provision of the Charter, it is clear that the Charter controls.

The apparent contradiction compels an interpretation of the CAC that gives force to the separation of powers provided in the Charter, while allowing the provisions of the CAC to serve the limited administrative and organizational function for which they were created. When interpreting a municipal charter, it is to be construed to give effect to all separate provisions and to harmonize them with statutory provisions whenever possible. *State ex rel. Fite v. Aeh* (1997), 80 Ohio St.3d 1, 4, 684 N.E.2d 285, 287. Language used in a municipal charter should be

construed according to its ordinary and common usage. *State ex rel. Minor v. Eschen* (1995), 74 Ohio St.3d 134, 138, 656 N.E.2d 940, 944.

The City apparently takes the position that by establishing Title XVIII of the CAC, Council delegated its power to declare emergencies in advance (over 50 years in advance in this case) in order to permit a prompt response when emergencies subsequently arise. Yet, such an interpretation would eviscerate the cautionary requirement in Article I, Section III that Council identify the reason for emergency action and that the declaration obtain the public votes of six members. The City's construction would allow the decision to declare an emergency to be made entirely in private, separate from Council, and without the need for explanation.

The City's position is irreconcilable with the text of the Charter, but is also undermined by other language of the CAC. Even within CAC, Title XVIII, there is language acknowledging Council's role in any such emergency action. Under Section 5, the Mayor, Vice Mayor, or City Manager "shall, to the extent that time and the availability of the persons listed herein permit, confer and consult with the safety director, police chief, fire chief, members of the council and other persons conversant with the circumstances that then exist." Furthermore, Title XVIII, Section 9 acknowledges Council's power to terminate any state of emergency.

CAC Title XVIII's provisions are reconcilable with the Charter only if they are read to confer the Mayor with emergency powers after a declaration of emergency is carried out by Council, in public with the votes of two-thirds of its members. The CAC can only provide a "plan of administrative organization" as contemplated by Charter, Article II, Section 7.

The clear mandate of Charter, Article II, Section 3 controls the initial declaration of an emergency. Since Council never made such a declaration concerning the events of May 29, the

Curfew is of no effect—and cannot form the basis for any arrests or prosecution, including the arrest and prosecution of Defendant.

4. *A pre-existing emergency declaration intended to address the COVID-19 pandemic cannot authorize the imposition of a curfew to quell unrelated property damage and violence.*

The City apparently attempts to rely on an earlier, unrelated emergency declaration in order to justify the Curfew. All of the Mayor’s Emergency Orders recite that they are “based upon the emergency declaration *currently existing* in the City of Cincinnati, which declaration pursuant to Article III of the Charter was approved by City Council.” (*Emphasis added*). Curiously, none of the Emergency Orders provide a date or docket number by which the purported emergency declaration or the approval of Council could be located. Thus, the Court is left to scour Council’s records for pre-existing emergencies.

A review of Council’s records evidences only one possible source of such a pre-existing emergency: a series of statements filed by the Mayor in which the Mayor purports to issue emergency declarations premised upon “the critical need to allow the City of Cincinnati to take appropriate action to protect against the spread of COVID-19 in Cincinnati and to protect vulnerable populations in Cincinnati and the Greater Cincinnati region from contracting COVID19.” (See Exhibit E, statement dated March 11, 2020; *see also* Mayor’s statements dated April 8, 2020, May 12, 2020)

In the first place, as set forth above, it is Council that is vested with the power to declare emergencies under the Charter, not the Mayor. While the Mayor’s statements may be effective tools to communicate policy goals, they are not sufficient to vest him with sweeping new powers simply because he issues them. Since none of the Mayor’s statements reflect that they were voted upon by Council, they are ineffective to establish a state of emergency.

Yet, even if the Mayor did have the power to declare an emergency, under the Charter, the emergency actions taken must be directly related to the reasons stated for the emergency. Under Article II, Section 2 of the Charter, any emergency declaration must specifically set forth the reasons for the necessity of emergency action. An emergency declaration may not generically grant emergency powers to be taken up later at the Mayor's whim to address any new situation.

Here, the Emergency Order allegedly underlying Defendant's arrest—like the Emergency Orders relating to all arrests of protesters who supposedly violated the Mayor's Curfew—states that:

The need for this order arises from property damage and violence in several areas in the City of Cincinnati on May 29, 2020 through May 30, 2020; the threat of continued and escalating violence; the need for security and enforcement support for the Cincinnati Police Department; and, the need to protect the City's first responders from the spread of COVID-19.

The text of the Emergency Order and the enforcement of the Curfew make clear that the conditions that the City sought to address arose from protests and allegations of property damage and violence beginning on May 29. The City's objective in imposing the Curfew is stated clearly in each one of the hundreds of identically worded complaints that it has filed against persons charged with violating the Curfew:

The purpose of this emergency declaration was to abate the destruction and violence associated with illegal rioting in response to law enforcement personnel. In the late hours of May 29, 2020, through the early hours of May 30, 2020, rioters destroyed property, looted businesses, and attacked Cincinnati Police officers.

(*See Complaint*).

The “processing officer” who swore under oath to the veracity of this allegation completely failed to mention that the emergency may have been related to the COVID-19 crisis.

It seems obvious that when contemplating the imposition of the Curfew, the City recognized that procuring an emergency declaration from Council might be politically

inexpedient. Thus, the City gratuitously recited “prevention of the spread of COVID-19” as additional grounds for the imposition of the Curfew. This rhetorical flourish cannot save the Curfew.

Ohio’s courts have on many occasions reviewed attempts by City governments to avail themselves of emergency powers and have found that such powers are limited and must be exercised in strict compliance with the procedures by which they are created. It is clear that a city government does not have the power “to declare an ordinance to be an emergency measure for reasons which are obviously illusory or tautological.” *Walsh v. Cincinnati City Council* (Ohio Ct. App., Hamilton County 1977), 54 Ohio App. 2d 107, 111; *see also Vill. of Moscow v. Moscow Vill. Council* (C.P. Clermont Cty. 1984), 29 Ohio Misc. 2d 15, 504 N.E.2d 1227. Ohio’s Supreme Court itself has not hesitated to invalidate emergency legislation in a case where the government attempted to justify emergency actions with explanations that failed to connect the proposed action with the emergency conditions. *State ex rel. Hasselbach v. Sandusky Cty. Bd. of Elections* (2019), 157 Ohio St.3d 433.

In short, if the City declares an emergency because of COVID-19, the emergency actions taken under such a declaration must be legitimately directed to address conditions identified in the declaration. The imposition of the Curfew had absolutely no relationship to any public health measures designed to reduce the spread of COVID-19. At the time of the Curfew, the City and the State of Ohio had in fact lifted most restrictions previously imposed on businesses designed to limit the spread of COVID-19. The Stay at Home Order had been lifted, restaurants were open for dine-in service, and most office and retail establishments were open. Indeed, during the Curfew, the City was permitting large demonstrations to take place during daylight hours in its own park facilities including Fountain Square and Washington Park, where thousands of people

gathered to protest the killing of George Floyd, and where hundreds of police officers were deployed. If the Curfew had been intended to curb large gatherings, there is no reason why it would have been directed to night time hours during this time when demonstrations and business were carried on with no restriction during the day.

Furthermore, even during the height of the restrictions imposed by the Stay at Home order, protected First Amendment Speech was specifically permitted by the Ohio Board of Health. (See Exhibit F, Stay at Home Order, paragraph 12(g))

To the extent that any prior declaration of emergency existed on May 30, 2020 related to the COVID-19 pandemic, such declaration could not serve as a basis for the imposition of the Curfew to reduce the risk of property damage or violence during a protected political demonstration. The Curfew was completely unrelated to the COVID-19 emergency and cannot form the basis for any arrests or prosecution, including the arrest and prosecution of Defendant.

B. The Mayor's Curfew Order and Emergency Declaration Violate the Ohio Open Meetings Act.

The Ohio Open Meetings Act (“the Act”), codified as Ohio Revised Code 121.22, requires “public officials to take official action and to conduct all deliberations upon official business only in open meetings.” The Act defines a “public body” as “any legislative authority or board, commission, committee, council, agency, authority, or similar decision-making body of any county, township, municipal corporation...or other political subdivision or local public institution.” In addition, R.C. 121.22(H) provides that “a resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body.” The Act itself instructs that its provisions are to be liberally construed in favor of openness and transparency, and Ohio courts have interpreted the Act to strictly require open governance. *See, e.g., White v. King*, 147 Ohio St.3d 74, 2016-Ohio-2770; R.C. 121.22(A) (instructing that the Act “shall be

liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law.”).

As discussed above, the City Charter only enables the Mayor to act in an emergency—with the consent of the City Council. A review of the Council’s recent meeting minutes, however, reveals no public meeting at which the Council contemplated an emergency related to the Black Lives Matter protests or enabled the Mayor to enact a curfew. *See* City Council Minutes May 28, 2020 Meeting, available at <https://www.cincinnati-oh.gov/council/meeting-agendas-minutes/council-minutes/>. If Council did vote on or approve a declaration related to property damage or the protests, there is no record of it in Council’s public minutes. As a result, the general public was neither made aware of, nor allowed to observe or participate in, any such deliberations.

Neither was the public invited to attend any meeting at which the Mayor’s expanded legislative role was debated, discussed, or ratified. Without such a declaration from Council, the Mayor – an executive official – engaged in the legislative function of creating a criminal offense through his Curfew Orders without soliciting the input of the public or even notifying the public of his intended action. This omission too violates the Open Meetings Act.

The Act ties the openness requirement to the official action taken at the meeting. *State ex rel. More Bratenahl v. Village of Bratenahl*, 157 Ohio St.3d 309, 2019-Ohio-3233, at ¶ 14. Not only must the meeting be open, but any official action must take place in an open meeting. *Id.* Because R.C. 121.22(H) invalidates rules that are not adopted in an open meeting of the public body, both the Mayor’s Curfew Order and any preceding emergency declaration or expansion of Mayoral power by the City Council are invalid and cannot be enforced. In light of this, the

Mayor's Curfew cannot form the basis for any arrests or prosecution, including the arrest and prosecution of Defendant.

C. The Complaint Should be Dismissed Because the Curfew Is Unconstitutionally Vague and Vests Arresting Officers with Unbridled Discretion.

The Curfew is unconstitutionally vague because it purports to impose strict criminal liability upon people without defining the conduct that constitutes a violation; it fails to define the physical areas where the Curfew is in effect; and, it fails to specify the persons to whom it applies. The imprecise language of the Curfew leaves all people to guess whether they will become subject to its penalties by their mere presence within the City.

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that [a person] is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that [they] may act accordingly. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. Third, but related, where a vague statute 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.'"⁴

City of Akron v. Rowland (1993), 67 Ohio St. 3d 374, 381, *citing Grayned v. Rockford* (1972), 408 U.S. 104, 108-9.

The operative language of the Curfew provides as follows:

Individuals are prohibited *from appearing in the public spaces* of the City of Cincinnati neighborhoods of Over-the-Rhine, the Central Business District/Downtown, the Banks, and the West End during the period of the curfew. This order is inapplicable to City of Cincinnati officials, members of the public safety forces, emergency personnel, *health care professionals, essential workers, people experiencing homelessness*, and local government officials engaged in their lawful duties.

May 30, 2020 Curfew (*emphasis added*).⁴

⁴ The Curfew orders issued on May 31, 2020 and June 3, 2020 used identical language except that they purported to be applicable to the entire City of Cincinnati, rather than the four neighborhoods identified in the May 30 Curfew.

The Curfew contains no definitions, nor any reference to any separate source of definitions. Despite their obvious significance, the Curfew provided no guidance whatsoever as to the meaning of the terms “appearing in,” “public spaces,” “health care professionals,” “essential workers,” “people experiencing homelessness,” or any other terms. The absence of such definitions deprives even the most well-meaning individual of any ability to determine the scope and reach of the Curfew, and how one might comply.

1. The term “public spaces” is unconstitutionally vague.

The Curfew prohibits people from appearing in “public spaces.” The legal research conducted by the undersigned revealed no definition of the term “public spaces” within the Ohio Revised Code (“ORC”) or the Cincinnati Municipal Code (“CMC”). Yet, a conscientious citizen could be forgiven should they mistake “public spaces” for “public places,” which are defined as: “...an enclosed area to which the public is invited or in which the public is permitted and that is not a private residence.” O.R.C. 3794.01(B).⁵ A citizen could also reasonably interpret “public spaces” to refer only to clearly delineated parks, plazas, and government buildings.

Yet, in some legal contexts, private property may also be considered “public space.” It is well established that private businesses may be considered “places of public accommodation,” yet the Curfew does not explicitly mandate the closure of private businesses during the restricted hours. Thus, customers and owners of restaurants, taverns, and retail businesses are left to wonder whether such locations are “public spaces” under the Curfew. And if gatherings in privately owned places of public accommodation are not prohibited, then it must be inferred that travelling on streets and sidewalks to and from such lawful gatherings is also not prohibited. The Curfew leaves every citizen to risk their freedom in order to find out.

The problem with the use of this term is apparent from the face of the Complaint. The processing officer⁶ alleges that the arresting officer ordered the Defendant to leave “the property” but that the Defendant then refused to leave “the area.” The Complaint does not contain even a conclusory allegation that the Defendant appeared in a “public space.” On this basis alone, the Complaint should be dismissed.

⁵ This definition is by its terms applicable for purposes of identifying Smoke Free Workplaces.

⁶ The Complaint is signed by a “processing officer” who apparently lacks personal knowledge rather than a police officer who was actually present for Defendant’s alleged offense.

The Curfew's application to "public spaces" without a definition or reference to permit a citizen or officer to know where the Curfew is applicable creates unconstitutional vagueness.

2. *The term "appearing in" is unconstitutionally vague.*

Next, the citizen is left to discern what constitutes "appearing in" a public space. The phrase is undefined in the Curfew, and the research of the undersigned discloses that neither the ORC nor the CMC provide a definition of the phrase. Yet, "appearing in" is distinct from "being present" or "being out of doors." It poses a particular ambiguity in the case of a person leaving a "public space" at the restricted hour under the Curfew with the intention of simply going home. The confusion that results constitutes plain unconstitutional vagueness.

The Curfew recites CMC Article XVIII as the basis of its authority, and Section 7(d) of that Article purports to give the Mayor authority to "establish a curfew during such hours of the day or night as deemed advisable *and prohibit persons from being out of doors during such curfew.*" (*Emphasis added*). Yet, the language of the Curfew does not go so far as to impose a blanket prohibition from being out of doors. The Curfew is more limited, permitting people to be out of doors anywhere except within "public spaces," and prohibits only "appearing in" such public spaces.

Had the Curfew contained language prohibiting all people from being out of doors during restricted hours, ambiguity may have been avoided. For whatever reason, the City chose not to do so. By the language of the Curfew, the Mayor purposefully limited its scope, allowing people to be out of doors except under enumerated, yet undefined circumstances. The language employed in the Curfew created ambiguity that places all people at risk. Having chosen language to impose a curfew that is less restrictive than may be provided for under Section 7, the City is not at liberty to attempt to enforce the Curfew beyond its express terms. The ambiguity is unconstitutional.

3. *The limitations on applicability of the Curfew create unconstitutional vagueness.*

Finally, any citizen must determine whether the Curfew is even applicable to them. The Curfew identifies several classes of persons to whom its restrictions do not apply, but the Curfew provides no definitions of these classes. “[H]ealth care professionals, essential workers, [and] people experiencing homelessness” (among others) are all classes of persons to whom the Curfew does not apply, and the use of these terms in the Curfew renders it unconstitutionally vague.⁷

While all three of these classes are broad, and ripe for differing interpretations, “essential workers” is particularly problematic. As noted elsewhere in this Motion, the term “essential workers” is now commonly associated with workers exempt from the “Stay at Home Orders” imposed by the Ohio Department of Health as a result of COVID-19. As of this writing, the City of Cincinnati’s website contains a COVID-19 update which makes reference to “essential businesses.” (<https://www.cincinnati-oh.gov/covid19/news/ohio-stay-at-home-order-extended-through-may-1/>). City Council has routinely used the term “essential” in resolutions related to COVID-19, and in at least one case, in a resolution in which the Stay at Home Order was referenced. (See Cincinnati City Council minutes of Meeting April 29, 2020, Item # 202000644) Further confusing matters, the Curfew gratuitously recites “the need to protect the City’s first responders from the spread of COVID-19” as part of the rationale for the restrictions. Thus, any citizen could reasonably look to the Ohio Department of Health for guidance on who is an “essential worker.” The guidelines of the Ohio Department of Health add to the ambiguity.

“Essential worker” is not defined under the March 22, 2020 Director’s Stay at Home Order (See Exhibit F)(“Director’s Order”) However, the terms “Essential Businesses and

⁷ The complaint contains not even a conclusory allegation that the Defendant is not a member of any of these classes.

Operations” and “Essential Infrastructure” are defined under the Director’s Order. “Essential-Businesses and Operations” includes 25 separate industries and activities, one of which is “*First Amendment Protected Speech*.” So any citizen within any of those classes, including a protester, could reasonably consider themselves an “essential worker” to whom the Curfew does not apply. The definition of “Essential Infrastructure” under the Director’s Order identifies dozens of businesses and activities. The Director’s Order also defines walking, hiking, running, and biking as “Essential Activities.” Nowhere does the Curfew require that an “essential worker” be engaged in their duties in order to be exempt. In the absence of clear direction within the Curfew, all of the “essential” activities and persons could reasonably be deemed by a citizen to be exempt from any of the strictures of the Curfew.

The terms “health care worker” and “person experiencing homelessness” also create ambiguity as to the scope of applicability of the Curfew.⁸ The lack of clarity in the applicability of the Curfew constitutes unconstitutional vagueness.

4. *The lack of definitions and ambiguity in the Curfew render it unconstitutionally vague and vest unbridled discretion in the enforcing officers in violation of due process under both the U.S. and Ohio Constitutions.*

Both the federal and Ohio courts have long histories of striking down vague criminal enactments particularly where the same would restrict First Amendment protected activities. The U.S. Supreme Court invalidated the City of Cincinnati’s loitering ordinance in *Coates v. Cincinnati* (1971), 402 U.S. 611, 615:

[T]he vice of the ordinance lies not alone in its violation of the due process standard of vagueness. The ordinance also violates the constitutional right of free

⁸ Further complicating matters, Defendant was charged R.C. 2917.13, which contains the proviso that “Nothing in this Section shall be construed to limit access or deny information to any news media representatives in the lawful exercise of the news media representative’s duties.” Presumably, the City will concede that the Curfew is not applicable to “news media representatives,” which is also not defined.

assembly and association. Our decisions establish that mere public intolerance or animosity cannot be the basis for abridgment of these constitutional freedoms.

Ohio has a well-developed jurisprudence addressing vague criminal statutes which unfairly leave law-abiding people subject to arrest and conviction and which are used to target groups marked by particular social status. *See e.g. City of Akron v. Rowland* (1993), 67 Ohio St.3d 374; *State v. Barnes*, 2001-Ohio-1747, 2001 Ohio App. LEXIS 4968; *City of Cleveland v. Mathis* (1999), 136 Ohio App. 3d 41, 735 N.E.2d 949.

Yet, a lack of definitions in operative language of a criminal enactment poses a particular risk for violation of due process. In *City of Alliance v. Carbone* (2009), 181 Ohio App. 3d 500, the court considered the enforcement of a loitering statute which failed to define the term “loiter”:

The term “loiter” is not defined anywhere in the Alliance Municipal Code. Nothing in A.M.O. 941.06(h) requires that a crime actually be committed in order to support an arrest or conviction. This law is clearly designed to nip crime “in the bud.” A criminal statute must be reasonably clear and definite and there must be identifiable standards of guilt on which citizens, courts, and the police may rely in order for the law to comport with due process. A person cannot be punished simply because the state believes that he or she is probably a criminal. It is a constitutional imperative that the dividing line between the lawful and the criminal be clear to all and not subject to conjecture.

City of Alliance at 509, ¶ 39 (internal citations omitted).

The court’s analysis in *City of Alliance* is highly relevant here. Just like the loitering statute failed to define “loiter,” the Curfew fails to define the conduct it criminalizes. The Curfew does not inform a citizen what it means to “appear in a public space,” nor does it provide even the most basic descriptions of the many classes of persons to whom the Curfew does not apply. The Curfew instead focuses on allegations of past crimes committed by other persons and makes clear that it seeks to “nip in the bud” repetition of such crimes. The language of the Complaint reflects the lack of clarity as to what conduct is prohibited in that it also gratuitously

recites unrelated allegations of past crimes committed by others. Indeed, the narrative of the Complaint contains more words describing the events that led to the imposition of the Curfew than words describing Defendant's alleged conduct. But the language of the Curfew nonetheless fails to clearly define the persons, areas, and conduct that are affected by its restrictions. In the City's rush to quell the demonstrations in the streets, it utterly failed to adequately warn people in the City of the sweep of its Curfew.

In *State v. Bielski*, 2013-Ohio-5771, Ct. App. 7 Dist., No. 12 MA 217 (Dec. 19, 2013), the court reversed a conviction based on the vagueness of a city's property maintenance code which criminally punished failure to remove trash, but failed to define the critical words in the statute. In that case the court observed:

Because the relevant Youngstown Ord. attempts to make violations of this law a strict liability offense punishable by up to 60 days in jail, one would expect a clear definition of such terms as "accumulation," "rubbish," "garbage," "exterior," "interior," "structure," and "premises." "If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them."

Bielski at ¶ 16, quoting *City of Akron v. Rowland* (1993), 67 Ohio St.3d 374.

Bielski offers a close parallel to the instant case because in both instances, the lack of definitions and the use of broad language in the enactment gave the citizen no notice of what conduct was being criminalized and left the interpretation of the law entirely to the government official. *See also State v. ACV Realty*, 2016-Ohio-3247, at ¶ 21, 2016 Ohio App. LEXIS 2095, 2016 WL 3078887 (reversing conviction and noting vagueness resulting from lack of definitions of the terms "clean," "safe," and "sanitary").

The lack of adequate definitions and clear language defining the offense provide well established legal grounds for the invalidation of a criminal enactment. The lack of definitions

and clear language in the Curfew renders it void for vagueness. Thus, the Complaint at issue here cannot form the basis of the arrest and prosecution of Defendant and must be dismissed.

5. *The Curfew fails to provide discernible standards to ensure uniform enforcement.*

A significant hazard of a vague criminal enactment is that it renders uniform enforcement impossible and leaves the police or other enforcing officers as the sole judge of what constitutes a punishable violation. “A law is also impermissibly vague when it ‘delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.’” *City of Akron, supra*, 67 Ohio St. 3d at 383-384, *citing Grayned, supra; see also Bielski, supra* at ¶¶ 19-20.

In *City of Akron*, the Ohio Supreme Court took note of the fact that such discretionary criminal statutes are disproportionately enforced against “racial and ethnic minorities.” *Supra* at 384. *See also Shuttleworth v. City of Birmingham* (1969), 394 US 147; *City of Cleveland, supra*, 136 Ohio App. 3d 41. In the instant case, the Curfew has been applied specifically against demonstrators in urban neighborhoods engaged in protected protest over the killing of African-Americans by police, while affluent communities around the City have seen no enforcement whatsoever. The Curfew has empowered precisely the type of arbitrary enforcement that the court in *City of Akron* warned against. The arrests under the Curfew were concentrated in African-American communities, some of which have previously been the subjects of curfews during demonstrations in 1968 and 2001. In addition, one of the neighborhoods most critically affected by the Curfew, Over the Rhine, was once the subject of a City ordinance, later found unconstitutional, that imposed an “exclusion zone.” *See Johnson v. City of Cincinnati* (6th Cir. 2002), 310 F.3d 484, 487. In short, there is history of enforcement in Cincinnati targeted at African-American communities.

In a *piece de resistance* of vagueness, the language of the Curfew is explicitly ambiguous on the precise question of whether or how it may be enforced. In the initial paragraph, the Curfew states that “[t]hese conditions...*may* require enhanced enforcement authority and security resources to protect the lives and property of those who live, work, and do business in Cincinnati.” (*Emphasis added*). Reading this language, any citizen could reasonably conclude that police are not yet empowered to enforce the Curfew without a further declaration that “enhanced enforcement” is to be engaged. Similarly, any police officer may fairly read that they “may” enforce or not enforce the Curfew, in their discretion.

The Curfew suffers from all of the touchstones that indicate an unconstitutionally vague enactment under both Ohio and federal law. Accordingly, this Court should dismiss the Complaint.

D. The Curfew Violates the First Amendment Right of Free Speech.

The Curfew violates the First Amendment’s protection of political speech because: first, the City has failed to identify any compelling government interest that it seeks to achieve with the Curfew; and second, because the Curfew is not narrowly tailored to achieve any government objective.

A demonstration by people in the streets in protest of police violence is the *purest* form of political speech. It is entitled the highest level of protection under the First Amendment and under the Ohio Constitution. *See Cox v. Louisiana* (1965), 379 U.S. 536. Therefore, any restriction upon such demonstrations or protests is subject to strict scrutiny. In order to meet this exacting test, the City must demonstrate that the Curfew is necessary to achieve a compelling government interest, and narrowly tailored to do so. *Burson v. Freeman* (1992), 504 U.S. 191, 198; *R.A.V. v. City of St. Paul* (1992), 505 U.S. 377, 395.

I. The City has not identified a compelling interest.

The Curfew fails to meet strict scrutiny in the first place because the City has never identified a compelling government interest that it seeks to achieve with the Curfew. In the Emergency Orders, the City attempts to walk two paths. Primarily, it claims that it seeks to protect against “destruction and violence” and provide “security and enforcement.” Yet, in the same breath, the City disparately claims that the purpose of the order is to protect first responders from the spread of COVID-19.

The City’s unwillingness to articulate a single reason why it needs the Curfew is telling. It confesses an awareness that the Curfew is not well founded to meet Constitutional standards. Should the City at some point identify the “existing emergency declaration,” it may illuminate the City’s purposes.

Yet, assuming that both of these are the real reasons for the imposition of the Curfew, neither are compelling. With respect to the prevention of COVID-19, the imposition of the Curfew is completely unrelated to any effort to abate the spread of the virus. With people free to protest and gather all day long, with no mandatory mask requirements, with restaurants, gyms and yoga studios, and day care centers open, a night time curfew could do nothing to limit transmission of the coronavirus.

The prevention of destruction and violence is also not a compelling interest distinct from City government’s core function. The prevention of crime and protection of property are the reason for the establishment of a police force, and it is the sole charge of that institution on any given day. The City’s recitation of this objective does little more than to state the purpose of government as a concept.

Neither of the claimed reasons for the Curfew are compelling government interests that can withstand strict scrutiny.

2. *The Curfew is not narrowly tailored.*

The Curfew violates the First Amendment because it is not narrowly tailored. Whether the City's objective is to prevent crime and provide security, or to abate the spread of COVID-19, the Curfew fails this test. The Curfew is both overinclusive because it burdens speech excessively, and underinclusive, because it permits conduct which defeats the ostensible purposes.

A party challenging a restriction based on "narrow tailoring" may succeed in doing so by showing that there are less restrictive means by which the government could achieve its objective. *See e.g. Burson*, 504 U.S. at 208-9.

In its attempts to prevent crime, the City enforced the curfew by deploying hundreds of officers in riot armor, tear gassing demonstrators, corralling them, and arresting them *en masse*. Yet, with the exact same police resources, the City could have protected against crime by simply allowing police to patrol the neighborhoods where the demonstrations occurred and intervening to prevent those specific crimes from happening or arresting persons found actually committing crime. The suppression of protected demonstrations (and ordinary daily life in the City) added nothing to the ability of the police to patrol and protect the City.

The overbreadth of the City's Curfew is similar to that noted by the Supreme Court in *Schneider v. New Jersey* (1939), 308 U.S. 147. In *Schneider*, the city had an ordinance that forbade the handing out of leaflets on public streets. The city claimed that the ordinance was designed to prevent littering which inevitably resulted from the distribution of leaflets to people who may discard them. The Court voided the ordinance and held that the municipality could not prohibit one person's protected speech in order to prevent another person's crime.

[T]he purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from

handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press. This constitutional protection does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets.

Id. at 162.

The same reasoning applies to the City's Curfew. The law permits the City to patrol to prevent crime and to investigate and prosecute crime when it occurs. Yet, it may not issue a blanket prohibition on all outdoor political gatherings in the City in order to prevent crime by others. In *Schneider*, the Supreme Court held unequivocally that protected speech does not lose its protection even when it imposes burdens upon society, and incidental crime is one such burden. The Curfew is unforgivably overbroad in this respect.

Further illustrating the point, the City has already admitted that there was no direct connection between demonstrations and lawlessness: Mayor Cranley made a public statement in which he acknowledged that the people engaging in criminal behavior "were not part of the protest." *Cincinnati mayor announces curfew after protest violence on Friday night*, WKYC Studios (My 30, 2020), <https://www.wkyc.com/article/news/local/ohio/cincinnati-mayor-announces-curfew-after-protests-turn-violent/95-d4b716ae-6534-4efe-971d-8384887f3e73>.

The lack of narrow tailoring is even more obvious with respect to the City's claimed goal of preventing COVID-19. There are obvious and more effective means that the City could have imposed without limiting any speech. Had the City simply required people to wear masks outdoors, or imposed social distancing requirements, the risks would have been effectively controlled without imposing any burden on protected speech. The imposition of the nighttime Curfew could have no meaningful effect on COVID-19 transmission.

3. *The Curfew is underinclusive.*

The underinclusiveness of the Curfew also demonstrates that it is not narrowly tailored to protect the purported government interests. By its terms, the Curfew is inapplicable to “essential workers,” “heath care professionals,” and “persons experiencing homelessness.” These exemptions render the Curfew ineffective to allow effective prevention of crime.

As noted in other sections of this Motion, the term “Essential Workers” may include construction workers and tradespeople. Thus, the Curfew explicitly permits people to roam the streets carrying tools that may be used for vandalism and looting, while driving trucks and vans which may be used to transport stolen goods. A potential looter could easily pass for an “Essential Worker,” making it more difficult for police to effectively patrol and investigate.

In a riot, persons experiencing homelessness could become highly vulnerable to random violence and theft. Police efforts to protect innocent people from criminals are all the more difficult when such vulnerable people are visible in the urban core. Yet, the City did not see fit to command persons experiencing homelessness to report to the available shelters and social service facilities.

The Curfew is at once overinclusive in that it restricts excessive amounts of protected speech that pose no threat, yet also underinclusive in exempting from restriction many persons who may increase the risk of crime. These facts demonstrate that the Curfew is not narrowly tailored and is therefore invalid under the First Amendment and Ohio Constitutions.

4. *The Curfew is not a content neutral time, place, and manner restriction.*

The City will surely take the position that the Curfew is defensible as a mere restriction on the time, place, and manner in which protected speech may take place. This position is untenable because the Curfew is not content neutral, nor are its restrictions narrowly tailored to

promote a substantial government interest—and as a result, the Complaint against Defendant must be dismissed.

a. The Curfew is not content neutral.

A government may impose time, place and manner restrictions upon speech (“TPM”), and these are subject to a less rigorous Constitutional standard. However, in order to enjoy the relaxed standard, the restriction must be “content neutral.” *See Clark v. Community for Creative Non-Violence* (1984), 468 U.S. 288, 295. That is, it may not discriminate between speakers or viewpoints.

But in its enforcement of the Curfew, the City allowed some parties to engage in protected speech, while preventing others from doing so. News media and journalists were exempted from arrest under the Curfew as a matter of policy. When a reporter for the Cincinnati Enquirer was arrested twenty minutes after Curfew on June 1, 2020, he was later released without charges. Both the Mayor and the Cincinnati Police Department later made public apologies for the arrest, and the Police Chief made a public affirmation of “the right of the press to cover our police.” *See Exhibit G, CPD and Cranley twitter posts; Cincinnati Enquirer Journalist Detained During Coverage, June 1, 2020,* <https://www.cincinnati.com/story/news/2020/06/01/cincinnati-enquirer-journalist-detained-during-protest-coverage/5313869002/>.⁹

Yet, other people engaged in live streaming of the protests at the same time in the same place were arrested for doing so. Thus, the City allows the “the press” to engage in speech, while repressing others. Specifically, the Curfew targeted persons engaged in speech perceived to criticize the government. This is the very definition of a content-based restriction.

⁹Oblivious to all irony, the Mayor continued in his tweet to state: “The right to a free press and to protest are inextricably intertwined.” Yet, the Mayor offered no apology nor any reprieve to the protesters, whom the police had deemed indistinguishable from the reporter.

It is well established under Supreme Court precedent that members of corporate or conventional media enjoy no greater right to gather and share information under the First Amendment than any other citizen. *See Branzburg v. Hayes* (1972), 408 U.S. 665, 684; *Houchins v. KQED, Inc.* (1978), 438 U.S. 1, 15-16. Thus, tolerance of “media” expression amid repression of citizen protest is clearly viewpoint based, and not content neutral.

Since the City’s enforcement is not content neutral, it may not claim that the Curfew is defensible under the TPM standard.

- b. The Curfew is not a valid time, place, and manner restriction because it burdens substantial amounts of protected speech leaving no viable alternative for demonstrations.

The Curfew fails as a TPM restriction because it is too broad and gives demonstrators no other options to engage in expressive conduct. In order to pass constitutional muster, a TPM restriction: 1) may not burden substantially more speech than is necessary to further the government’s legitimate interests; and, 2) must leave open ample alternative channels of communication. *Ward v. Rock Against Racism* (1989), 491 U.S. 781, 799.

Insofar as the City imposed a blanket restriction on any person “appearing in a public space,” the Curfew burdens more speech than necessary. The City made no attempt to provide for places, such as parks, where protected speech could take place while reducing the risk of property damage. Nor did it allow for permitting of scheduled demonstrations exempt from the Curfew. In its outright ban of all outdoor demonstrations throughout the City, the Curfew leaves no alternative.

The City will surely claim that that the Curfew meets TPM criteria because it allows any demonstration to take place during the daylight hours. Yet, for many people, these hours offer no option at all. For a diverse population of demonstrators, constraints of work, education, or availability of child care prevent them from joining a demonstration during the hours selected by

the City. With criminal penalties applicable to any demonstration in the whole of the nighttime, many people were left with no alternative to engage in protected speech.

In at least one respect the terms of the Curfew itself demonstrate how it burdens more speech than necessary and provides no meaningful alternative: on May 30, the Curfew was made applicable to only four neighborhoods, thus allowing people to engage in expressive conduct in other places in the City. Yet, the following day, and in the succeeding Second and Third Emergency Orders, the Mayor expanded the Curfew's sweep, imposing it on the whole of the City. If not earlier, the Second and Third Emergency Orders represent an exhaustive and complete ban on all protected demonstrations with no alternative left open.

The Curfew fails to meet even the more permissive constitutional standard applicable to a TPM restriction.

5. *Peaceful protests are constitutionally protected.*

Among the rights protected by the First Amendment from overbroad governmental regulation is the right of association for the purpose of engaging in political activity. *See, e.g., Citizens Against Rent Control Coalition for Fair Housing v. Berkeley* (1981), 454 U.S. 290, 294 (“the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process”). Undergirding this right is the concept that collective action resonates more effectively than individual speech. *Id.* Indeed, “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.” *NAACP v. Alabama ex rel. Patterson* (1958), 357 U.S. 449, 460. In this regard, the right of free expression and the right to free association are inextricably linked; the individual right to speak out on public and political topics is all the stronger when a group of individuals chooses to speak collectively for a common purpose. *See, e.g., NAACP v. Claiborne Hardware Co.* (1982), 458 U.S. 886.

When the speech itself is political in nature, these rights are protected even further. Embedded in the First Amendment's guarantee of free expression is the notion that core political speech is deserving of the utmost protection, particularly when the content of the speech is controversial or unpopular. *See, e.g., Texas v. Johnson* (1989), 491 U.S. 397, 414 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). In fact, "a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'" *Id.* at 408-9 (citing *Terminiello v. Chicago*(1949), 337 U.S. 1, 4). This core function of the First Amendment produces an ironic yet important result; it is the potentially offensive and unpopular expression that is most deserving of constitutional protection.¹⁰

Where collective speech focuses on content protected by the First Amendment, courts have a duty to protect collective political activity from government overreaching and harassment. For example, in *Claiborne*, the Supreme Court acknowledged the First Amendment protection that adheres to forceful political action in support of a boycott: "[s]peech does not lose its protected character [...] simply because it may embarrass others or coerce them into action."

¹⁰ Consistent with this principle, the United States Supreme Court has recognized only three limited categories of expressive material not deserving of First Amendment protection: 1) "fighting words," or words which are likely to provoke an immediate, violent response, *Brandenburg v. Ohio* (1969), 395 U.S. 444; *Chaplinsky v. New Hampshire* (1942), 315 U.S. 568; 2) child pornography, *New York v. Ferber* (1982), 458 U.S. 747; and 3) obscenity, *Miller v. California* (1973), 413 U.S. 15. The Supreme Court has also extended only limited First Amendment protection to libel and slanderous statements that are false or were published with reckless disregard for their truth. *See Hustler Magazine v. Falwell* (1988), 485 U.S. 46; *Time, Inc. v. Hill* (1967), 385 U.S. 374; *New York Times v. Sullivan* (1964), 376 U.S. 254. Absent the application of these exceptions, the First Amendment prohibits governments from enacting a prior restraint on the right to engage in protected expression and expressive conduct by criminally prosecuting individuals who choose to exercise that right. *See Dombrowski v. Pfister* (1965), 380 U.S. 479, 487 ("The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure."); *see also Wisconsin v. Mitchell* (1993), 508 U.S. 476 (recognizing that hate crime sentencing enhancement may enact a chilling effect on the expression of unpopular beliefs).

Claiborne, 458 U.S. at 910. Similarly, in *State of Missouri v. National Org. for Women, Inc.* (8th Cir. 1980), 620 F.2d 1301, the Eighth Circuit extended First Amendment protection to an organized state-wide boycott designed to pressure Missouri into ratifying the Equal Rights Amendment. Indeed the core protection of the First Amendment is to protect and insulate unpopular points of view.

In addition, heightened protection applies to speech offered in traditional public forums like streets and sidewalks. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n* (1983), 460 U.S. 37. Quintessential public forums include streets and parks, both of which are places traditionally open to assembly and debate. *Id.*

Given this backdrop, and as a starting point, individuals participating in peaceful protests are cloaked with the full protection of the First Amendment.

6. *The curfew order is impermissibly content-based.*

Content-based restrictions on speech are presumptively unconstitutional, a point the Supreme Court recently reaffirmed in *Reed v. Town of Gilbert* (2015), 135 S.Ct. 2218; *see also R.A.V.*, 505 U.S. at 395. In *Reed*, the Supreme Court struck down a sign ordinance which included various exceptions and variable standards depending on whether the sign was political, elections-oriented, or bore some other non-commercial message. The Court found that the ordinance was content-based and subject to strict scrutiny. The Court cited a commercial case--*Sorrell v. IMS Health Inc.* (2011), 131 S.Ct. 2653--for the principle that heightened scrutiny was required when content-based discriminations are found in a law.

The majority opinion in *Reed* noted that there had been some “slippage” in First Amendment cases over the years, whereby the lower courts have upheld laws unless the content-based distinctions directly reflect an intent to regulate based on issue or speaker. The lower courts have also tended to uphold laws affecting speech where the government offered a content-

neutral reason for choosing a particular category for regulation. Thus, categorical exceptions were not treated as content-based laws unless they appeared to be targeted at a particular message. The circuit court in *Reed* had taken just that approach:

As the court explained, “Gilbert did not adopt its regulation of speech because it disagreed with the message conveyed” and its “interests in regulat[ing] temporary signs are unrelated to the content of the sign.” *Ibid.* Accordingly, the court believed that the Code was “content-neutral as that term [has been] defined by the Supreme Court.” *Id.* at 1071. In light of that determination, it applied a lower level of scrutiny to the Sign Code and concluded that the law did not violate the First Amendment. *Id.* at 1073–1076.

Reed, 135 S.Ct. at 2226.

The Supreme Court rejected this approach, adopting instead a more formalistic analysis. Under the post-*Reed* regime, a law will be declared content-based if it adopts categories, exclusions, or exclusions defined in terms of what is said:

Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. *E.g.*, *Sorrell v. IMS Health, Inc.*, 564 U.S. __, __, 131 S.Ct. 2653, 2663–2664, 180 L.Ed.2d 544 (2011); *Carey v. Brown*, 447 U.S. 455, 462, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980); *Mosley, supra*, at 95, 92 S.Ct. 2286. This commonsense meaning of the phrase “content based” requires a court to consider whether a regulation of speech “on its face” draws distinctions based on the message a speaker conveys. *Sorrell, supra*, 131 S.Ct., at 2664. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

Reed, 135 S.Ct. at 2227.

In addition to laws which explicitly regulate in terms of what is said, the Court also held that laws which are content-neutral on their face will be treated as content-based if their justification relies on distinctions between the message or the messenger:

Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be “justified without reference to the content of the

regulated speech,’ ‘or that were adopted by the government ‘because of disagreement with the message [the speech] conveys,’ *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Those laws, like those that are content based on their face, must also satisfy strict scrutiny.¹¹

Reed, 135 S.Ct. at 2227.

In applying *Reed*, the lower federal courts have faithfully applied strict scrutiny, noting that laws which create distinctions based on categories of speech are likely invalid. *See, e.g., FF Cosmetics FL, Inc. v. City of Miami Beach* (11th Cir. Aug. 10, 2017), 2017 WL 3431453 (invalidating advertising ban in the Miami Beach historic district for lack of content neutrality); *Norton v. City of Springfield, Ill.* (7th Cir. 2015), 806 F.3d 411, 412-13 (invalidating content-based panhandling restriction by applying strict scrutiny under *Reed*); *Browne v. City of Grand Junction* (D. Colo. 2015), 136 F.Supp.3d 1276 (same); *Cahaly v. Larosa* (4th Cir. 2015), 796 F.3d 399 (invalidating state statute prohibiting unsolicited marketing and politically related calls as content-based and unconstitutional under the First Amendment); *Gresham v. Rutledge* (E.D. Ark. 2016), 2016 WL 4027901 (same); *Thomas v. Schroer* (W.D. Tenn. Sept. 8, 2015), 2015 WL 5231911. Notably, these cases do not limit *Reed*’s application to sign ordinances, but apply strict scrutiny to a whole host of speech-related restrictions, regardless of the manner of delivery of the speech in question. *See, e.g., Norton*, 806 F.3d at 412. In fact, at least one federal court has explicitly held that regulation of sexually-oriented speech, traditionally a marginalized speech category, is content-based and therefore subject to strict scrutiny under *Reed*. *See Free Speech Coalition, Inc. v. Atty. Gen. of the United States* (3d Cir. 2016), 825 F.3d 149, 160-64. Thus,

¹¹ In the wake of *Reed*, the Supreme Court vacated and remanded similar decisions from three other circuits (the First, Fourth, and Sixth) on the basis that the courts improperly declined to impose strict scrutiny when analyzing the constitutionality of various sign ordinances. *See Thayer v. City of Worcester* (2015), 135 S.Ct. 2887 (reversing and remanding *Thayer v. City of Worcester* (1st Cir. 2014), 755 F.3d 60, on basis of *Reed*); *Central Radio Co., Inc. v. City of Norfolk, Virginia* (2015), 135 S.Ct. 2893 (reversing and remanding *Central Radio Co., Inc. v. City of Norfolk* (4th Cir. 2015), 776 F.3d 229); *Wagner v. City of Garfield Heights, Ohio* (2015), 135 S.Ct. 2888 (reversing *Wagner v. City of Garfield Heights* (6th Cir. 2014), 577 Fed.Appx. 488, in light of *Reed*).

Reed requires strict scrutiny in any instance where a government regulation singles out speech for disparate treatment based upon its content or message.¹²

The Mayor's Curfew order restricts speech on the basis of its content. As explained above, left unregulated--and in fact expressly exempted from compliance with the curfew order--is speech presented by members of the media. As the Mayor recently explained following the arrest of a Cincinnati Enquirer journalist after curfew, "The arrest of an Enquirer reporter was a big mistake. He has been released." John Cranley, Twitter, June 1, 2020 9:27 pm. The exclusion of categories of speakers in *Reed* was precisely what rendered the ordinance unconstitutional. So too here does the favorable treatment for expression deemed "news" require a consideration of content and speaker before determining whether the speech is allowed. Content favoring legislation like this is presumptively unconstitutional.

7. *The Mayor's Curfew Order Violates the First Amendment Right of Assembly.*

The right to assemble peaceably is "among the most precious" rights protected in the Constitution. *United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n* (1967), 389 U.S. 217, 222. Indeed, "the very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably ... and to petition for a redress of grievances." *De Jonge v. Oregon* (1937), 299 U.S. 353, 364 (quoting *United States v. Cruikshank* (1875), 92 U.S. 542, 552). Assembly enjoys strong constitutional protections, due to its close relation to the broad right of free speech. *See NAACP*, 357 U.S. at 460. Naturally, the right to assemble includes the right to verbally express grievances, but it also includes the right to protest peacefully in public places

¹² In addition, legal scholars have also emphasized the impact of *Reed*, characterizing it as "sea change" in First Amendment jurisprudence and noting that *Reed*'s "redefinition of content discrimination...revolutionize[d]" free speech doctrine. *See* Anthony Lauriello, *Panhandling Regulation After Reed v. Town of Gilbert*, 116 Colum. L. Rev. 1105, 1105 (May 2016); Urja Mittal, *The "Supreme Board of Sign Review": Reed and Its Aftermath*, 125 Yale L.J.F. 359, 359 (2016).

where a person has a right to remain. *Brown v. Louisiana* (1966), 383 U.S. 131, 141-2. And this means that the First Amendment limits the government's ability to restrict a peaceful assembly in a public forum.

While not absolute, the government can only restrict to halt some immediate danger that it must protect. *See Cox v. Louisiana* (1965), 379 U.S. 536, 554-5. But the mere fact that some members of a group engaged in some unprotected conduct does not justify the government's interference with the constitutional rights of the entire group. *See NAACP*, 458 U.S. at 908. Any restriction on the right to assemble in a public forum, such as a sidewalk or park, must be content-neutral and reasonably related to the time, place and manner of the assembly. *See, e.g., Clark*, 468 U.S. at 293. The government must narrowly tailor its actions to a significant interest through a regulation promoting a substantial government interest. *See Ward*, 491 U.S. at 799. What is clear, however, is that the government may not simply abridge free assembly because of its animosity to the assembly's message. *See Coates*, 402 U.S. at 615.

Any law that a government passes that restricts the freedom of assembly must pass this standard—including a curfew. “The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.” *Grayned v. City of Rockford* (1972), 408 U.S. 104, 117. Thus, if the curfew restricts one's freedom of assembly beyond that which is incompatible to expected activity in a public forum, it surpasses the limits the government can place on this expressive activity. So, a curfew receives a “particularly high degree of scrutiny” when it restricts the right to peaceably assemble. *NAACP*, *W. Region v. City of Richmond* (9th Cir. 1984), 743 F.2d 1346, 1355; *see also, e.g., Cox*, 379 U.S. at 550 (overturning protestors' convictions for breach of the peace because peaceful

protesting was protected under the freedom to assemble); *Edwards v. South Carolina* (1963), 372 U.S. 229 (same).

The Mayor's Curfew order fails to satisfy this exacting form of constitutional scrutiny. It was implemented based on the invidious intent to silence speech about systemic racism, to punish those engaged in that expression, and to chill still others from adding their voices to the growing movement in support of black liberation. It violates the First Amendment.

E. The City Has Selectively Enforced the Curfew in Violation of the Fourteenth Amendment Equal Protection Clause.

Selective enforcement refers to actions where the state chooses to enforce a law against one group or person without punishing others. The Equal Protection Clause of the Fourteenth Amendment is the basis for a “selective enforcement” claim because the state makes a “selection [that] was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.” *Oyler v. Boyles* (1962), 368 U.S. 448, 456. It arises when the state treats a person differently compared to those similarly situated because the State intends to punish exercise of a constitutional right. *Arnold v. City of Columbus* (6th Cir. 2013), 515 Fed. Appx. 524, 539. Courts judge these cases based on the same standards as an Equal Protection claim, meaning selective enforcement requires showing a discriminatory purpose and effect. *Gardenhire v. Schubert* (6th Cir. 2000), 205 F.3d 303, 318. A discriminatory purpose can be shown through evidence that the state enforced the law partially because of, and not in spite of, “its adverse effects on an identifiable group.” *Bennett v. City of Eastpointe* (6th Cir. 2005), 410 F.3d 810, 818.

A selective enforcement claim proceeds in three parts. First, it must be shown that an official singled out a group exercising constitutional rights and makes a *prima facie* showing that the official does not go after comparators. *Gardenhire*, 205 F.3d at 319. Second, the official must demonstrate the absence of a discriminatory purpose. *Id.* Finally, the criminal defendant’s or civil plaintiff’s group must suffer a discriminatory effect. *Id.*

Strict scrutiny applies where there is a classification that “impermissibly interferes with the exercise of” free speech. *Mass. Bd. of Ret. v. Murgia* (1976), 427 U.S. 307, 312. In the context of free speech, a decision to enforce or prosecute one group of individuals exercising their First Amendment rights while allowing other to continue a prohibited course of conduct

would constitute selective enforcement or discriminatory prosecution. *See Macko v. Byron* (N.D. Ohio 1982), 555 F.Supp. 470, 477-8 (finding that prosecuting plaintiffs for making false statements in campaign to recall political officials while not prosecuting others not in the campaign who also made false statements fulfilled *prima facie* discriminatory prosecution case). For instance, in *Perkins v. City of Gahanna* (S.D. Ohio Sept. 21, 2000), No. C2-99-533, 2000 WL 1459444, at *2-3, it was clear that the state selectively enforced a disorderly conduct statute when it punished a man in retaliation when he raised his middle finger to a police officer after an argument. Or a decision to encourage certain protestors' demonstrations who hold a similar viewpoint to the state while punishing their counter-protestors would also count as selective enforcement. *See Center for Bio-Ethical Reform, Inc. v. Black* (W.D. N.Y. 2017), 234 F.Supp.3d 423, 436.

From its inception, the City has utilized the curfew order solely to punish those participating in demonstrations related to the death of George Floyd and in support of the movement for black liberation. Upon information and belief, it has not arrested or charged individuals outside of the downtown and Clifton Heights area for violating the curfew and has not applied the curfew to any other expressive activity besides the ongoing peaceful protests. Of all 508 unique arrests for violations of R.C. 2917.13 during the period of the protests, not a single arrest took place outside the territorial jurisdiction of the Cincinnati Police Department. Nor did the City impose curfews and utilize violence against speakers when 1.25 to 1.5 million people descended on Cincinnati for Blink 2019,¹³ when approximately 100,000 people attended Cincinnati Pride,¹⁴ or when approximately 10,000 people attended the Women's March in

¹³ WLWT Digital Staff, "BLINK 2019 was largest event in region's history, organizers say," WLWT 5 (Oct. 16, 2019), <https://www.wlwt.com/article/blink-was-largest-event-in-cincinnati-area-history-organizers-say/29491583#>.

¹⁴ Kathryn Robinson, "Cincinnati Pride celebrates 46th year on Saturday," Local 12 (June 22, 2019), <https://local12.com/news/local/cincinnati-pride-celebrates-46th-year-on->

2018.¹⁵ This pattern of selective enforcement only reinforces the content-based nature of the curfew itself. It was adopted to target speech because of its content, and it is being enforced in a similarly discriminatory manner.

F. The Charges Against Defendant Are Unconstitutional as Applied in This Case.

In addition to the arguments that the charges in this case and the Mayor's Curfew order are facially unconstitutional, Defendant further submits that the charges violate the First and Fourteenth Amendments as applied to the specific facts of this case. Defendant seeks an evidentiary hearing to submit testimonial and documentary evidence demonstrating the constitutional invalidity of the charges as applied here.

G. The Complaint Is Insufficient Because It Was Not Signed by an Officer with Personal Knowledge.

Under Crim. R. 3, a "complaint is a written statement of the essential facts constituting the offense charged. It shall also state the numerical designation of the applicable statute or ordinance. It shall be made upon oath before any person authorized by law to administer oaths."

Under R.C. 2935.09, which requires official review before a criminal complaint is filed, subsection (B) requires that "[i]n all cases not provided by sections 2935.02 to 2935.08 of the Revised Code, in order to cause the arrest or prosecution of a person charged with committing an offense in this state, a peace officer or a private citizen having knowledge of the facts shall comply with this section." In these cases, the complaints were filed by peace officers, not private citizens. Under R.C. 2935.09(C), "[a] peace officer who seeks to cause an arrest or prosecution

saturday#:~:text=CINCINNATI%20(WKRC)%20%2D%20Cincinnati%20Pride,the%20modern%20day%20LGBTQ%20movement.

¹⁵ Ken Brown, "10,000 show up for Cincinnati's second Women's March," FOX 19 (January 19, 2018), <https://www.fox19.com/story/37307145/thousands-expected-to-come-out-for-womens-march/>.

under this section may file with a reviewing official or the clerk of a court of record an affidavit charging the offense committed.”

Here, the complaints filed against Defendant were not filed by peace officers with “knowledge of the facts,” but rather by “processing officers.” Furthermore, although a peace officer to notify is written on the complaints, the complaints filed are generic and were clearly completed *en masse*, presumably in advance of any arrests. *See State v. Allen*, 1st Dist. Hamilton Nos. C-120358, C-120359, 2013-Ohio-1673, ¶ 6 (reversing defendant’s conviction because the officer “did not swear to the facts of the complaint when she signed and dated it.”).

Regarding the personal knowledge of the peace officer filing the complaint, it appears the last time the issue was addressed by the First District Court of Appeals was in 1969. In that case, the First District elected to follow the 1952 Third District decision in *State v. Steele* (3d Dist. 1952), 95 Ohio App. 107, 117 N.E.2d 617, 618, which held, “* * * So far as the sufficiency of the affidavit is concerned, in a criminal proceeding the person making it need not have any personal knowledge of the facts alleged or have seen any of the acts committed.” *State v. Biedenharn* (1st Dist. 1969), 19 Ohio App.2d 204, 206, 250 N.E.2d 778, 779. The First District said:

The law provides a means to redress a grievance based upon the filing of a false affidavit. It seems to us that it would be a gross error to deprive a citizen of the means to bring to the bar of justice another who he is willing to swear committed an offense against the public.

Therefore, we conclude that Section 2935.09, Revised Code, does not demand personal knowledge as a prerequisite to the filing of an affidavit.

Although *Biedenharn* has never been overturned (it has not been cited since 2001), it is ripe for reconsideration because the decision does not harmonize with the language in R.C. 2935.09, which, again, states, “a peace officer * * * having knowledge of the facts *shall comply*

with this section" (emphasis added). The Supreme Court of Ohio has repeatedly said it will "generally construe a statute containing the word 'shall' as mandatory." *In re K.M.*, 2020-Ohio-995, __ N.E.3d __, citing *Dorrian v. Scioto Conservancy Dist.* (1971), 27 Ohio St.2d 102, 271 N.E.2d 834, paragraph one of the syllabus. R.C. 2935.09(B) is therefore clear and must be followed. A peace officer must have knowledge of the facts in the complaint – which is not to say knowledge of *all* of the facts in the complaint; but enough facts to file a complaint – and must comply with R.C. 2935.09 in order for a complaint to be valid. Here, because the processing-officer had no knowledge of the facts in the complaints – facts, again, which were clearly produced *en masse* and likely in advance – the complaints here were not valid. *Biedenharn* was incorrectly decided and must be overturned. Because "[a] complaint must be valid in order for a court to obtain subject-matter jurisdiction," *Allen, supra* at ¶ 2, citing *Columbus v. Jackson* (10th Dist. 1952), 93 Ohio App. 516, 114 N.E.2d 60, this court lacks jurisdiction to hear these cases. Accordingly, these cases must be dismissed.

Furthermore, specific facts in the complaint relating to each defendant are necessary for a complaint to be valid. In 2012, the Seventh District reviewed the necessity of specific facts in the complaint:

An officer seeking an arrest warrant must establish his grounds for his belief that the defendant committed the crime, and where the belief is based upon someone witnessing the offense, the affidavit or complaint should establish who witnessed the offense. *See Jaben v. U.S.*, 381 U.S. 214, 223–224, 85 S.Ct. 1365, 14 L.Ed.2d 345 (1965) (distinguishing such case from a tax evasion case where there is no actual witness to the act). The complaint must provide a foundation for the issuing authority to make a judgment that a warrant is justified. *Id.* at 224.

"Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police." *U.S. v. Ventresca*, 380 U.S. 102, 109, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965). The complaint or affidavit in support thereof must provide the officer's answer to the question:

“What makes you think that the defendant committed the offense charged?”
(Emphasis added.) *Jaben*, 381 U.S. at 224.

In yet another case, the complaint unaccompanied by an affidavit stated that the officer swore that on a particular date in a particular county, the defendants did “unlawfully break and enter a locked and sealed building” and described the building’s location and ownership. *Whiteley v. Warden*, 401 U.S. 560, 563–564, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971). The Court found that this consisted “of nothing more than the complainant’s conclusion that the individuals named therein perpetrated the offense described in the complaint.” *Id.* at 565. The Court noted that the actual basis of the officer’s conclusion was an informant’s tip, but that fact, as well as every other operative fact dealing with probable cause, was omitted from the complaint. *Id.*

The Court concluded that this complaint alone could not support an independent judgment of a disinterested magistrate that probable cause existed. *Id.* at 565, 568. The Court also pointed out that an insufficient affidavit cannot be rehabilitated by later testimony concerning information possessed by the affiant but not disclosed to the issuing authority in the sworn document. *Id.* at 565, fn. 8, 566. See also *State v. Graddy*, 55 Ohio St.2d 132, 134, 378 N.E.2d 723 (1978), fn.1. The *Whitely* analysis on whether an officer has violated the Fourth Amendment remains valid. See *Arizona v. Evans*, 514 U.S. 1, 13, 115 S.Ct. 1185, 131 L.Ed.2d 34, —, 131 L.Ed. 34 (1995).

Thus, a form complaint would be insufficient where it merely recites the elements without a disclosure regarding why it appears to the officer that the defendant performed those elements. See *Overton v. Ohio*, 534 U.S. 982, 122 S.Ct. 389, 151 L.Ed.2d 317 (2001) (Breyer, J., with three other justices concurring in a statement disagreeing with the Court’s denial of certiorari in a case involving a form complaint used by the city of Toledo and announcing that they believe summary reversal was in order because the Court’s position on the issue is clear).

State v. Jones, 7th Dist. Mahoning No. 11 MA 60, 2012-Ohio-1301, ¶¶ 32-37 (emphasis in original).

In these cases, no supporting affidavits were filed. The complaints filed contained generic facts and were filed by peace officers with no personal knowledge of those facts. To allow these form complaints to stand would be to rubber stamp police action with no official review, which is mandatory under R.C. 2935.09. Such an action cannot stand. These cases must be dismissed.

H. The Complaint Is Insufficient Because It Fails to Plead with Particularity the Risk to Person or Property.

The Complaint is insufficient because it does not contain an allegation that Defendant's conduct created risk of physical harm to person or property. Instead, the Complaint relies upon conclusory predictions or arguments of law in order to allege that Defendant's conduct merits an enhanced charge.

Under O.R.C. 2917.13 misconduct at an emergency is a misdemeanor of the fourth degree, unless the conduct of the defendant creates a risk of physical harm to person or property. In such a case, the offense is a misdemeanor of the first degree.

Defendant in this case was charged with a first-degree misdemeanor. In order to meet the pleading requirements of the enhanced charge, the "processing officer" in this case (and other processing officers in hundreds of other cases with identical complaints) alleged in the complaint:

Violating the curfew order further creates/prolongs the emergency situation created by ongoing risk of illegal violence and property damage. [sic](See Complaint.)

Ohio's courts have held that a complaint that tracks the statutory language of an offense is sufficient to provide notice and to satisfy the municipal court's subject-matter jurisdiction. *State v. Smith*, 9th Dist. Summit No. 25069, 2010-Ohio-3983 ¶ 28, citing *State v. Landrum* (1990), 53 Ohio St.3d 107, 119. However, the statement in the Complaint is neither a factual allegation, nor a recitation of an element of the offense. Rather, this statement is a proposed conclusion of law.

O.R.C. 2717.13(C) recognizes a distinction between mere misconduct, and misconduct that poses risk of harm to persons or property. The City seeks to do away with the distinction, and posits that *any* misconduct in the purported emergency *per se* poses risk of physical harm to person or property. The statute requires more.

This Court should not countenance this clear example of cynical pleading strategy on such a massive scale. The City has subjected hundreds of its people to greatly enhanced charges, without the barest suggestion that there are facts to support the charge. This Court should dismiss the Complaint.

I. The Complaint Is Insufficient Because It Fails to Allege that the Curfew Is Applicable to Defendant.

The Complaint is insufficient because it fails to offer any factual allegation from which it could be discerned that the Curfew is applicable to Defendant. Since the Complaint does not allege that the Curfew was applicable to Defendant, it does not establish a *prima facie* case that a crime was committed. Accordingly, there was no probable cause for an arrest.

As noted above, the Curfew is not generally applicable. By its own terms, it is limited.

This Order is inapplicable to the City of Cincinnati officials, members of the public safety forces, emergency personnel, health care professionals, essential workers, people experiencing homelessness and local government officials engaged in their lawful duties.

(See Exhibit A)(***emphasis added***).

The Complaint contains not even a conclusory recitation that Defendant was subject to the restrictions of the Curfew or that the arresting (or processing) officer took any steps to ascertain Defendant's status before arresting them. The Curfew does not define these classes of persons as exceptions to the Curfew, but rather creates restrictions that are applicable only to certain persons. It is therefore the City's burden to establish the applicability of the Curfew in the Complaint. Because the City has failed to do so, the Complaint should be dismissed.

J. The Curfew Violates the Equal Protection Clause of the Fourteenth Amendment and the Equal Protection Guarantee of the Ohio Constitution.

The Complaint against Defendant should must be dismissed because it relies upon a Curfew that unfairly and disproportionately affects African-American people, communities, and supporters. Even if the Curfew is race neutral on its face, its enforcement denied African American people and their supporters the equal protection of the law.

1. *The federal and Ohio Equal Protection Clauses protect against unequal treatment on the basis of race.*

The Ohio and U.S. Constitutions protect individuals from being treated differently on the

basis of race. The Equal Protection Clause of the Fourteenth Amendment states that “No state shall... deny to any person within its jurisdiction the equal protection of the laws.” Similarly, Article I, Section 2 of the Ohio Constitution holds that the “all political power is inherent in the people. Government is instituted for their equal protection and benefit.” Ohio Supreme Court jurisprudence explicitly holds the Ohio Constitution’s guarantee of equal protection exceeds the protections afforded under the U.S. Constitution. *See State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶21; *see also id.* at ¶73 (Kennedy, J., dissenting).

Even facially race neutral enactments may infringe upon constitutional rights to equal protection. “[T]he law is clearly established that a state actor cannot apply a neutral statute with a purpose to discriminate invidiously on the basis of race. [...] To determine whether there was an impermissible racial motive, courts look to the *Arlington Heights* factors.” *Gay v. Cabinet for Health & Family Servs. Dept.* (6th Cir. 2019), 2019 U.S. App. LEXIS 2336, at *12 (internal citations omitted). In *Arlington Heights*, the U.S. Supreme Court provided a non-exhaustive list of factors for courts to consider when determining whether a facially neutral law nevertheless violates the Equal Protection Clause:

- “The impact of the official action -- whether it ‘bears more heavily on one race than another,’ [...] may provide an important starting point.” [...]
- “Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face.” [...]
- “The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes.” [...]
- “The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker’s purposes.” [...]
- “Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant,

particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached.” [....]

- “The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.” [....]

Village of Arlington Hts. v. Metro. Hous. Dev. Corp. (1977); 429 U.S. 252, 266-8.

2. *The impact of the Curfew weighs most heavily against African-Americans and those advocating for causes in support of African-Americans.*

The Curfew weighed most heavily against African-American residents of Cincinnati because it was implemented and enforced primarily in African-American neighborhoods, and against demonstrators engaged in protest for racial equality. “[T]o deny [to one] group use of the streets because of their views against racial discrimination, while allowing other groups to use the streets to voice opinions on other subjects, also amounts, I think, to an invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment.” *Police Dep’t of Chicago v. Mosley* (1972), 408 U.S. 92, 98, 92 (citing *Cox*, 379 U.S. at 581 Black, J. concurring).

When the City initially implemented the Curfew, it did so in only four neighborhoods which contain at least two predominately African-American populations. After the Curfew was expanded to include the entire City, the enforcement and arrests were concentrated in these same areas. Even when the City arrested white people and other non-African Americans, its enforcement was targeted at persons who acted in solidarity with the African-American community. The net effect of the enforcement of the Curfew was the imposition of a harsh crackdown on those who criticized the government in support of black people.

The imposition of a curfew is among the most draconian measures that a government may engage, and it is has accordingly been deployed rarely by the City. Yet, when curfews have

been imposed in modern history, they have been deployed only against protest in the African-American community. In 1968, at the time of the assassination of Rev. Martin Luther King Jr., the City imposed a curfew and arrested 220 people.¹⁶ In 2001, the City imposed a curfew and arrested over 800 people when demonstrations arose after the killing of Timothy Thomas by Cincinnati police.¹⁷

The City made use of a similar tactic in 1996, when it passed an ordinance excluding certain individuals from entering historically African-American neighborhood of Over-the-Rhine. The restriction was later found to be unconstitutional. *See Johnson*, 310 F.3d at 487. In short, there is a history in Cincinnati of disproportionately employing the most extreme police actions against African-American communities at the first sign of disruption.

Yet, the City does not react so harshly in response to gatherings of principally white populations. The City welcomes large and unruly crowds of sports fans which annually generate scores of arrests for vandalism, fighting, and alcohol related offenses. Rather than attempt to limit such gatherings, the City permits sports fans to convene on its property, tolerates alcohol and open fires, furnishes outdoor bathrooms, and cleans up the massive amounts of trash afterward. Similarly, when demonstrations of principally white demonstrators take to the streets, the City manages to accommodate the protest without mass arrests. The Women's March in 2017 was estimated to have drawn over 10,000 attendees, yet resulted in no mass arrests.

The charges are also invariably more harsh when they arise in connection with the African-American community. In 2011, when Occupy Cincinnati demonstrators spent weeks in

¹⁶ *See* Paul A. Tenkotte, "Our Rich History 1968: Riots erupt in Cincinnati following assassination of Rev. Martin Luther King Jr.", Northern Kentucky Tribune (Apr. 11th, 2018), available at <https://www.nkytribune.com/2018/04/our-rich-history-1968-riots-erupt-in-cincinnati-following-assassination-of-rev-martin-luther-king-jr/#:~:text=The%20city%20declared%20an%20immediate,Reading%20Roads%2C%20lay%20in%20ruins.&text=National%20Guardsmen%20help%20to%20quell,Riot%2C%20April%201968%2C%20Cincinnati.>

¹⁷ *See* Samuel Momodu, "The Cincinnati Riot (2001)," BlackPast (Oct. 21, 2017).

a City park, the arrestees were routinely cited for minor misdemeanor offenses without physical arrest. The most severe charges were fourth-degree misdemeanor criminal trespass. Yet hundreds of persons charged with Curfew violation in the instant case were uniformly charged with first-degree misdemeanors despite the absence of a single factual allegation of risk to person or property.

Taken together, the facts demonstrate disparate treatment that constitutes a denial of equal protection. The history of disproportionate police response to dissent in the African-American community, and the severity of the government restrictions and enforcement of the Curfew in this case are unconstitutional.

III. CONCLUSION

For the foregoing reasons, the pending charges should be dismissed. The City's arrest of people engaged in lawful protected protest was without probable cause, and unsupported by any law. The Court should accordingly dismiss the Complaint.

/s/ Samuel Heller

Samuel Heller (0099208)
Law Office of the Hamilton County Public
Defender
230 E. Ninth Street
Cincinnati, Ohio 45202
(513) 946-3720

/s/ Jennifer M. Kinsley

Jennifer M. Kinsley (0071629)
P. O. Box 19478
Cincinnati, Ohio 45219

/s/ J. Robert Linneman

J. Robert Linneman (0073846)
H. Louis Sirkin (0024573)
John D. Holschuh, III (0095377)
Santen & Hughes
600 Vine St., Suite 2700
Cincinnati, OH 45202
(513) 721-4450-ph
jrl@santenhughes.com
hls@santenhughes.com
jdhiii@santenhughes.com

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was served upon the City of Cincinnati
Prosecutor on July 7, 2020 by personal service.

/s/ Samuel Heller
Samuel Heller (0099208)

City of Cincinnati



Mayor John Cranley

Office of Mayor John Cranley

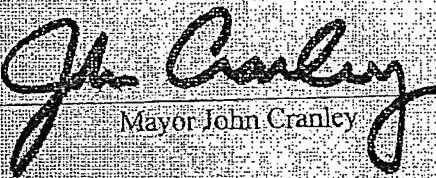
801 Plum Street, Suite 150
Cincinnati, Ohio 45202
Phone: (513) 352-3250
Fax: (513) 352-5201
Email: John.Cranley@cincinnati.oh.gov

Emergency Order

Upon consultation with and at the request of the City Manager and Chief of Police, and based upon the emergency declaration currently existing in the City of Cincinnati, which declaration pursuant to Article III of the City Charter was approved by the City Council, and pursuant to Article XVIII of the Administrative Code of the City of Cincinnati, I hereby order the implementation of a curfew from 10 p.m. to 6 a.m. in designated neighborhoods of the City of Cincinnati. The need for this order arises from destruction and violence in several areas of the City of Cincinnati, on May 29, 2020 through May 30, 2020, the threat of continued and escalating violence, the need for security and enforcement support for the Cincinnati Police Department, and the need to protect the City's first responders from the spread of COVID-19. These conditions presently constitute a clear and present danger to the health, safety, and property of the citizens of Cincinnati and may require enhanced enforcement authority and security resources to protect the lives and property of those who live, work, and do business in Cincinnati.

Individuals are prohibited from appearing in the public spaces of the City of Cincinnati neighborhoods of Over-the-Rhine, the Central Business District/Downtown, the Banks, and the West End during the period of the curfew. This order is inapplicable to City of Cincinnati officials, members of the public safety forces, emergency personnel, health care professionals, essential workers, people experiencing homelessness, and local government officials engaged in their lawful duties.

This order shall be effective at 1 p.m. on this 30th day of May, 2020, and shall terminate at 6 a.m. on the 1st day of June, 2020. This order shall be issued to the news media for the widest possible dissemination to the citizens of Cincinnati.


Mayor John Cranley

EXHIBIT

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City of Cincinnati



Mayor John Cranley

Office of Mayor John Cranley

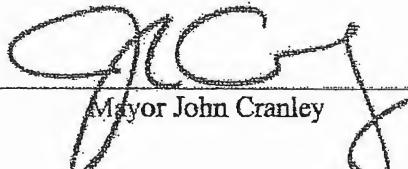
801 Plum Street, Suite 150
Cincinnati, Ohio 45202
Phone (513) 352-3250
Fax (513) 352-5201
Email: John.Cranley@cincinnati-oh.gov

Emergency Order

Upon consultation with and at the request of the City Manager and Chief of Police, and based upon the emergency declaration currently existing in the City of Cincinnati, which declaration pursuant to Article III of the City Charter was approved by the City Council, and pursuant to Article XVIII of the Administrative Code of the City of Cincinnati, I hereby order the implementation of a curfew from 9 p.m. to 6 a.m. in the City of Cincinnati. The need for this order arises from destruction and violence in several areas of the City of Cincinnati, on May 29, 2020 through May 31, 2020; the threat of continued and escalating violence; the need for security and enforcement support for the Cincinnati Police Department; and the need to protect the City's first responders from the spread of COVID-19. These conditions presently constitute a clear and present danger to the health, safety, and property of the citizens of Cincinnati and may require enhanced enforcement authority and security resources to protect the lives and property of those who live, work, and do business in Cincinnati.

Individuals are prohibited from appearing in the public spaces of the City of Cincinnati during the period of the curfew. This order is inapplicable to City of Cincinnati officials, members of the public safety forces, emergency personnel, health care professionals, essential workers, people experiencing homelessness, and local government officials engaged in their lawful duties.

This order shall be effective at 1 p.m. on this 31st day of May, 2020, and shall terminate at 6 a.m. on the 2nd day of June, 2020. This order shall be issued to the news media for the widest possible dissemination to the citizens of Cincinnati.


Mayor John Cranley

EXHIBIT

tables



City of Cincinnati



Mayor John Cranley

Office of Mayor John Cranley

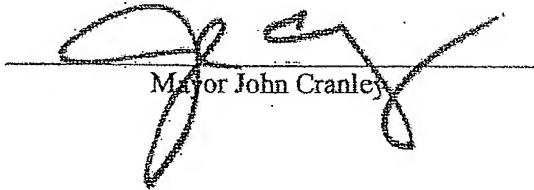
801 Plum Street, Suite 150
Cincinnati, Ohio 45202
Phone (513) 352-3250
Fax (513) 352-5201
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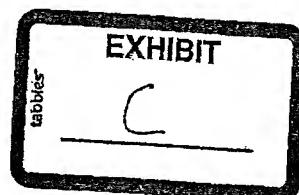
Emergency Order

Upon consultation with and at the request of the City Manager and Chief of Police, and based upon the emergency declaration currently existing in the City of Cincinnati, which declaration pursuant to Article III of the City Charter was approved by the City Council, and pursuant to Article XVIII of the Administrative Code of the City of Cincinnati, I hereby order the implementation of a curfew from 11 p.m. to 6 a.m. in the City of Cincinnati. The need for this order arises from destruction and violence in several areas of the City of Cincinnati, on May 29, 2020 through June 3, 2020; the threat of continued and escalating violence; the need for security and enforcement support for the Cincinnati Police Department; and the need to protect the City's first responders from the spread of COVID-19. These conditions presently constitute a clear and present danger to the health, safety, and property of the citizens of Cincinnati and may require enhanced enforcement authority and security resources to protect the lives and property of those who live, work, and do business in Cincinnati.

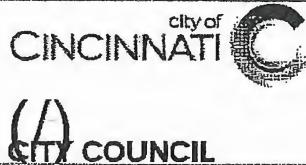
Individuals are prohibited from appearing in the public spaces of the City of Cincinnati during the period of the curfew. This order is inapplicable to City of Cincinnati officials, members of the public safety forces, emergency personnel, health care professionals, essential workers, people experiencing homelessness, and local government officials engaged in their lawful duties.

This order shall be effective at 12 p.m. on this 3rd day of June, 2020, and shall terminate at 6 a.m. on the 8th day of June, 2020. This order shall be issued to the news media for the widest possible dissemination to the citizens of Cincinnati.


Mayor John Cranley



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Q (/cityofcincinnati/display-objects/search-results/)

CITY COUNCIL



CITY COUNCIL MENU

Minutes Of Council Meetings

The minutes of Council provide a record of the items for a particular session of Council. Records of the items, including recorded votes, are recorded in the minutes.

June 10, 2020 (/council/meeting-agendas-minutes/council-minutes/june-10-2020/)

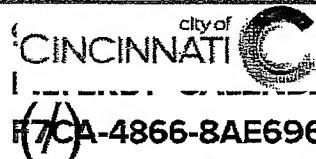
May 28, 2020 (/council/meeting-agendas-minutes/council-minutes/may-28-2020/)

May 21, 2020 (/council/meeting-agendas-minutes/council-minutes/may-21-2020/)

May 20, 2020 (/council/meeting-agendas-minutes/council-minutes/may-20-2020/)

May 19, 2020 (/council/meeting-agendas-minutes/council-minutes/may-19-2020/)

May 13, 2020 (/council/meeting-agendas-minutes/council-minutes/may-13-2020/)



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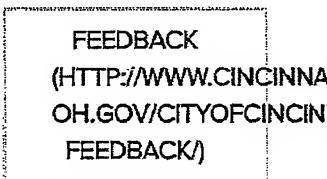
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10 (?)

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F7CA-4866-8AE69648B3429E03)

NEXT >

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Businesses (/cityofcincinnati/primary-navigation/businesses1/) ▾

Residents (/cityofcincinnati/primary-navigation/residents1/) ▾

Services (/cityofcincinnati/primary-navigation/services-payments/) ▾

Government (/cityofcincinnati/primary-navigation/government1/) ▾

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Record

Cincinnati City Council Items

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Item #:	202000445
Calendar Date:	03/11/2020
Sponsors:	MAYOR CRANLEY
Status/Recommendation:	FILE

Get Documents

202000445

03/11/2020

MAYOR CRANIFFY

STATEMENT, submitted by Mayor Cranley, pursuant to Article III of the Charter and Article XVIII of the Administrative Code of the City of Cincinnati, I declared a state of emergency earlier today based on the critical need to allow the City of Cincinnati to take appropriate action to protect against the spread of COVID19 in Cincinnati and to protect vulnerable populations in Cincinnati and the Greater Cincinnati region from contracting COVID19. During the period of emergency, I will work closely with the members of City Council, City Manager Patrick Duhaney, the City Administration, and the City of Cincinnati Board of Health to ensure that appropriate communication is taking place within all levels of City government and that appropriate notifications are being distributed to those in the Greater Cincinnati region, through the City of Cincinnati website, media sources and other appropriate channels. City Manager Patrick Duhaney will continue to carry out his role as the City's chief administrative and chief executive officer in order that City operations can proceed efficiently and with minimal disruption and to ensure that appropriate administrative actions are being carried out to minimize the public health risks associated with COVID19.

Final Disposition:

FILED

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Item #:	202000444	Get Documents
Calendar Date:	04/08/2020	
Sponsors:	MAYOR CRANLEY	
Status/Recommendation:	FILE	
Description:	STATEMENT, submitted by Mayor Cranley, upon consultation with and at the request of the City Manager, and based upon the emergency or public danger currently existing in the City of Cincinnati, I hereby issue this declaration of emergency pursuant to Article III of the Cincinnati Charter and Article XVIII of the Administrative Code of the City of Cincinnati. The emergency or public danger arises from verified reports of positive cases of contagion from COVID-19, an infectious disease caused by the novel coronavirus, in Ohio, Kentucky and Indiana and based on the recent declaration of a state-wide emergency in Ohio issued by Governor DeWine in relation to that public health emergency. The declaration of emergency is necessary to allow the City of Cincinnati to take appropriate action to protect against the spread of COVID-19 in Cincinnati and to protect vulnerable populations in Cincinnati and the Greater Cincinnati region from contracting COVID-19. Information received by the City Administration has established that the number of positive cases of COVID-19 may be significantly underreported due to the lack of adequate medical testing materials made available by the federal government, adding to the scope of the potential public health threat and potential need or rapid action. The public danger or emergency declared herein shall commence at 3 p.m. on the 11th day of March 2020, and shall terminate only upon the undersigned officer's determination that such emergency conditions no longer exist, or pursuant to the provisions of Article XVIII of the Administrative Code. The duration of such declared emergency shall not extend beyond two weeks from the date and time of the declaration unless extended by action of City Council. The declaration shall be issued to the news media for the widest possible dissemination to the citizens of Cincinnati.	
Final Disposition:	CONSENTED & FILED	

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Record

Cincinnati City Council Items

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Item #:	2020009487	Get Documents
Calendar Date:	05/12/2020	
Sponsors:	MAYOR CRANLEY	
Status/Recommendation:	FILE	
Description:	STATEMENT, submitted by Mayor Cranley, Upon consultation with and at the request of the City Manager, and based upon the emergency or public danger currently existing in the City of Cincinnati, I hereby issue this declaration of emergency pursuant to Article III of the Cincinnati Charter and Article XVIII of the Administrative Code of the Cincinnati. The emergency or public danger arises from verified reports of positive cases of contagion from COVID-19, an infectious disease caused by the novel coronavirus, in Ohio, Kentucky, and Indiana, and based on the recent declaration of a state-wide emergency in Ohio issued by Governor DeWine and the subsequent declaration of a national state of emergency issued by President Trump in relation to that public health emergency. The declaration of emergency is necessary to allow the City of Cincinnati to take appropriate action to protect vulnerable populations in Cincinnati and the Greater Cincinnati region from contracting COVID-19. Information received by the City Administration has established that the number of positive cases of COVID-19 may be significantly underreported in this region due to the lack of adequate medical testing materials made available by the federal government, adding to the scope of the potential public health threat and the potential need for rapid action. The public danger or emergency declared herein shall commence at 2:00 p.m. on this 20th day of March, 2020, and shall terminate only upon the undersigned officer's determination that such emergency conditions no longer exist, or pursuant to the terms of Article XVIII of the Administration Code. The duration of such declared emergency shall not extend beyond sixty days from the date and time of the declaration unless extended by action of City Council. The declaration shall be issued to the news media for the widest possible dissemination to the citizens of Cincinnati.	
Final Disposition:	CONSENTED & FILED	

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Department
of Health

Mike DeWine, Governor
Jon Husted, Lt. Governor

Amy Acton, M.D., MPH, Director

DIRECTOR'S STAY AT HOME ORDER

Re: Director's Order that All Persons Stay at Home Unless Engaged in Essential Work or Activity

I, Amy Acton, MD, MPH, Director of the Ohio Department of Health (ODH), pursuant to the authority granted to me in R.C. 3701.13 to "make special orders...for preventing the spread of contagious or infectious diseases" Order the following to prevent the spread of COVID-19 into the State of Ohio:

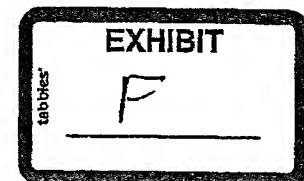
- 1. Stay at home or place of residence.** With exceptions as outlined below, all individuals currently living within the State of Ohio are ordered to stay at home or at their place of residence except as allowed in this Order. To the extent individuals are using shared or outdoor spaces when outside their residence, they must at all times and as much as reasonably possible, maintain social distancing of at least six feet from any other person, with the exception of family or household members, consistent with the Social Distancing Requirements set forth in this Order. All persons may leave their homes or place of residence only for Essential Activities, Essential Governmental Functions, or to participate in Essential Businesses and Operations, all as defined below.

Individuals experiencing homelessness are exempt from this Order, but are strongly urged to obtain shelter, and governmental and other entities are strongly urged to make such shelter available as soon as possible and to the maximum extent practicable (and to use in their operation COVID-19 risk mitigation practices recommended by the U.S. Centers for Disease Control and Prevention (CDC) and the Ohio Department of Health (ODH)). This order does not apply to incarcerated individuals, they are to follow the guidance of the facility in which they are confined. Individuals whose residences are unsafe or become unsafe, such as victims of domestic violence, are permitted and urged to leave their home and stay at a safe alternative location. For purposes of this Order, homes or residences include hotels, motels, shared rental units, shelters, and similar facilities.

- 2. Non-essential business and operations must cease.** All businesses and operations in the State, except Essential Businesses and Operations as defined below, are required to cease all activities within the State except Minimum Basic Operations, as defined below. For clarity, businesses, including home-based businesses, may also continue operations consisting exclusively of employees or contractors performing activities at their own residences (i.e., working from home).

All Essential Businesses and Operations are encouraged to remain open. Essential Businesses and Operations shall comply with Social Distancing Requirements as defined in this Order, including by maintaining six-foot social distancing for both employees and members of the public at all times, including, but not limited to, when any customers are standing in line.

- 3. Prohibited activities.** All public and private gatherings of any number of people occurring outside a single household or living unit are prohibited, except for the limited purposes permitted by this Order. Any gathering of more than ten people is prohibited unless exempted by this Order. This is



in accordance with President Trump's coronavirus guidelines issued March 16, 2020. Nothing in this Order prohibits the gathering of members of a household or residence.

All places of public amusement, whether indoors or outdoors, including, but not limited to, locations with amusement rides, carnivals, amusement parks, water parks, aquariums, zoos, museums, arcades, fairs, children's play centers, playgrounds, funplexes, theme parks, bowling alleys, movie and other theaters, concert and music halls, and country clubs or social clubs shall be closed.

4. **Prohibited and permitted travel.** Only Essential Travel and Essential Activities as defined herein, are permitted. People riding on public transit must comply with Social Distancing Requirements to the greatest extent feasible. This Order allows travel into or out of the State to maintain Essential Businesses and Operations and Minimum Basic Operations.
5. **Leaving the home for Essential Activities is permitted.** For purposes of this Order, individuals may leave their residence only to perform any of the following Essential Activities:
 - a. **For health and safety.** To engage in activities or perform tasks essential to their health and safety, or to the health and safety of their family or household members or persons who are unable or should not leave their home (including, but not limited to, pets), such as, by way of example only and without limitation, seeking emergency services, obtaining medical supplies or medication, or visiting a health care professional.
 - b. **For necessary supplies and services.** To obtain necessary services or supplies for themselves and their family or household members or persons who are unable or should not leave their home, or to deliver those services or supplies to others, such as, by way of example only and without limitation, groceries and food, household consumer products, supplies they need to work from home, automobile supplies (including dealers, parts, supplies, repair and maintenance), and products necessary to maintain the safety, sanitation, and essential operation of residences.
 - c. **For outdoor activity.** To engage in outdoor activity, provided the individuals comply with Social Distancing Requirements, as defined below, such as, by way of example and without limitation, walking, hiking, running, or biking. Individuals may go to public parks and open outdoor recreation areas. However, public access playgrounds may increase spread of COVID-19, and therefore shall be closed.
 - d. **For certain types of work** To perform work providing essential products and services at Essential Businesses or Operations (which, as defined below, includes Healthcare and Public Health Operations, Human Services Operations, Essential Governmental Functions, and Essential Infrastructure) or to otherwise carry out activities specifically permitted in this Order, including Minimum Basic Operations.
 - e. **To take care of others.** To care for a family member, friend, or pet in another household, and to transport family members, friends, or pets as allowed by this Order. This includes attending weddings and funerals.
6. **Elderly people and those who are vulnerable as a result of illness should take additional precautions.** People at high risk of severe illness from COVID-19, including elderly people and those who are sick, are urged to stay in their residence to the extent possible except as necessary

to seek medical care. Nothing in this Order prevents the Department Health or local health departments from issuing and enforcing isolation and quarantine orders.

7. **Healthcare and Public Health Operations.** For purposes of this Order, individuals may leave their residence to work for or obtain services through Healthcare and Public Health Operations.

Healthcare and Public Health Operations includes, but is not limited to: hospitals; clinics; dental offices; pharmacies; public health entities, including those that compile, model, analyze and communicate public health information; pharmaceutical, pharmacy, medical device and equipment, and biotechnology companies (including operations, research and development, manufacture, and supply chain); organizations collecting blood, platelets, plasma, and other necessary materials; licensed medical marijuana dispensaries and licensed medical marijuana cultivation centers; obstetricians and gynecologists; eye care centers, including those that sell glasses and contact lenses; home healthcare services providers; mental health and substance use providers; other healthcare facilities and suppliers and providers of any related and/or ancillary healthcare services; and entities that transport and dispose of medical materials and remains.

Specifically included in Healthcare and Public Health Operations are manufacturers, technicians, logistics, and warehouse operators and distributors of medical equipment, personal protective equipment (PPE), medical gases, pharmaceuticals, blood and blood products, vaccines, testing materials, laboratory supplies, cleaning, sanitizing, disinfecting or sterilization supplies, and tissue and paper towel products.

Healthcare and Public Health Operations also includes veterinary care and all healthcare services provided to animals.

Healthcare and Public Health Operations shall be construed broadly to avoid any impacts to the delivery of healthcare, broadly defined. Healthcare and Public Health Operations does not include fitness and exercise gyms, spas, salons, barber shops, tattoo parlors, and similar facilities.

8. **Human Services Operations.** For purposes of this Order, individuals may leave their residence to work for or obtain services at any Human Services Operations, including any provider funded by the Ohio Department of Aging, Department of Developmental Disabilities, Department of Health, Department of Job and Family Services, Department of Medicaid, Department of Mental Health and Addiction Services, Opportunities for Ohioans with Disabilities, Department of Veterans Services, and Department of Youth Services that is providing services to the public and including state-operated, institutional, or community-based settings providing human services to the public.

Human Services Operations includes, but is not limited to: long-term care facilities; day care centers, day care homes, group day care homes; residential settings and shelters for adults, seniors, children, and/or people with developmental disabilities, intellectual disabilities, substance use disorders, and/or mental illness; transitional facilities; home-based settings to provide services to individuals with physical, intellectual, and/or developmental disabilities, seniors, adults, and children; field offices that provide and help to determine eligibility for basic needs including food, cash assistance, medical coverage, child care, vocational services, rehabilitation services; developmental centers; adoption agencies; businesses that provide food, shelter, and social

services, and other necessities of life for economically disadvantaged individuals, individuals with physical, intellectual, and/or developmental disabilities, or otherwise needy individuals.

Human Services Operations shall be construed broadly to avoid any impacts to the delivery of human services, broadly defined.

9. **Essential Infrastructure.** For purposes of this, individuals may leave their residence to provide any services or perform any work necessary to offer, provision, operate, maintain and repair Essential Infrastructure.

Essential Infrastructure includes, but is not limited to: food production, distribution, fulfillment centers, storage facilities, marinas, and sale; construction (including, but not limited to, construction required in response to this public health emergency, hospital construction, construction of long-term care facilities, public works construction, school construction, essential business construction, and housing construction); building management and maintenance; airport operations; operation and maintenance of utilities, including water, sewer, and gas; electrical (including power generation, distribution, and production of raw materials); distribution centers; oil and biofuel refining; roads, highways, railroads, and public transportation; ports; cybersecurity operations; flood control; solid waste and recycling collection and removal; and internet, video, and telecommunications systems (including the provision of essential global, national, and local infrastructure for computing services, business infrastructure, communications, and web-based services).

Essential Infrastructure shall be construed broadly to avoid any impacts to essential infrastructure, broadly defined.

10. **Essential Governmental Functions.** For purposes of this Order, all first responders, emergency management personnel, emergency dispatchers, legislators, judges, court personnel, jurors and grand jurors, law enforcement and corrections personnel, hazardous materials responders, child protection and child welfare personnel, housing and shelter personnel, military, and other governmental employees working for or to support Essential Businesses and Operations are categorically exempt from this Order.

Essential Government Functions means all services provided by the State or any municipality, township, county, political subdivision, board, commission or agency of government and needed to ensure the continuing operation of the government agencies or to provide for or support the health, safety and welfare of the public, and including contractors performing Essential Government Functions. Each government body shall determine its Essential Governmental Functions and identify employees and/or contractors necessary to the performance of those functions.

This Order does not apply to the United States government. Nothing in this Order shall prohibit any individual from performing or accessing Essential Governmental Functions.

11. **Businesses covered by this Order.** For the purposes of this Order, covered businesses include any for-profit, non-profit, or educational entities, regardless of the nature of the service, the function it performs, or its corporate or entity structure.

12. Essential Businesses and Operations. For the purposes of this Order, Essential Businesses and Operations means Healthcare and Public Health Operations, Human Services Operations, Essential Governmental Functions, and Essential Infrastructure, and the following:

- a. **CISA List.** On March 19, 2020, the U.S. Department of Homeland Security, Cybersecurity & Infrastructure Security Agency (CISA), issued a *Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response*. The definition of Essential Businesses and Operations in this Order includes all the workers identified in that Memorandum.
- b. **Stores that sell groceries and medicine.** Grocery stores, pharmacies, certified farmers' markets, farm and produce stands, supermarkets, convenience stores, and other establishments engaged in the retail sale of groceries, canned food, dry goods, frozen foods, fresh fruits and vegetables, pet supplies, fresh meats, fish, and poultry, prepared food, alcoholic and non-alcoholic beverages, any other household consumer products (such as cleaning and personal care products), and specifically includes their supply chain and administrative support operations. This includes stores that sell groceries, medicine, including medication not requiring a medical prescription, and also that sell other non-grocery products, and products necessary to maintaining the safety, sanitation, and essential operation of residences and Essential Businesses and Operations;
- c. **Food, beverage, and licensed marijuana production and agriculture.** Food and beverage manufacturing, production, processing, and cultivation, including farming, livestock, fishing, baking, and other production agriculture, including cultivation, marketing, production, and distribution of animals and goods for consumption; licensed medical marijuana use, medical marijuana dispensaries and licensed medical marijuana cultivation centers; and businesses that provide food, shelter, and other necessities of life for animals, including animal shelters, rescues, shelters, kennels, and adoption facilities;
- d. **Organizations that provide charitable and social services.** Businesses and religious and secular nonprofit organizations, including food banks, when providing food, shelter, and social services, and other necessities of life for economically disadvantaged or otherwise needy individuals, individuals who need assistance as a result of this emergency, and people with disabilities;
- e. **Religious entities.** Religious facilities, entities and groups and religious gatherings, including weddings and funerals.
- f. **Media.** Newspapers, television, radio, and other media services;
- g. **First amendment protected speech.**
- h. **Gas stations and businesses needed for transportation.** Gas stations and auto supply, auto-repair, farm equipment, construction equipment, boat repair, and related facilities and bicycle shops and related facilities;
- i. **Financial and insurance institutions.** Bank, currency exchanges, consumer lenders, including but not limited, to pawnbrokers, consumer installment lenders and sales finance lenders, credit unions, appraisers, title companies, financial markets, trading and futures

exchanges, payday lenders, affiliates of financial institutions, entities that issue bonds, related financial institutions, and institutions selling financial products. Also insurance companies, underwriters, agents, brokers, and related insurance claims and agency services;

- j. **Hardware and supply stores.** Hardware stores and businesses that sell electrical, plumbing, and heating material;
- k. **Critical trades.** Building and Construction Tradesmen and Tradeswomen, and other trades including but not limited to plumbers, electricians, exterminators, cleaning and janitorial staff for commercial and governmental properties, security staff, operating engineers, HVAC, painting, moving and relocation services, and other service providers who provide services that are necessary to maintaining the safety, sanitation, and essential operation of residences, Essential Activities, and Essential Businesses and Operations;
- l. **Mail, post, shipping, logistics, delivery, and pick-up services.** Post offices and other businesses that provide shipping and delivery services, and businesses that ship or deliver groceries, food, alcoholic and non-alcoholic beverages, goods, vehicles or services to end users or through commercial channels;
- m. **Educational institutions.** Educational institutions-including public and private pre-K-12 schools, colleges, and universities-for purposes of facilitating distance learning, performing critical research, or performing essential functions, provided that social distancing of six-feet per person is maintained to the greatest extent possible. This Order is consistent with and does not amend or supersede prior Orders regarding the closure of schools;
- n. **Laundry services.** Laundromats, dry cleaners, industrial laundry services, and laundry service providers;
- o. **Restaurants for consumption off-premises.** Restaurants and other facilities that prepare and serve food, but only for consumption off-premises, through such means as in-house delivery, third-party delivery, drive-through, curbside pick-up, and carry-out. Schools and other entities that typically provide food services to students or members of the public may continue to do so under this Order on the condition that the food is provided to students or members of the public on a pick-up and takeaway basis only. Schools and other entities that provide food services under this exemption shall not permit the food to be eaten at the site where it is provided, or at any other gathering site due to the virus's propensity to physically impact surfaces and personal property. This Order is consistent with and does not amend or supersede prior Orders regarding the closure of restaurants;
- p. **Supplies to work from home.** Businesses that sell, manufacture, or supply products needed for people to work from home;
- q. **Supplies for Essential Businesses and Operations.** Businesses that sell, manufacture, or supply other Essential Businesses and Operations with the support or materials necessary to operate, including computers, audio and video electronics, household appliances; IT and telecommunication equipment; hardware, paint, flat glass; electrical, plumbing and heating material; sanitary equipment; personal hygiene products; food, food additives, ingredients and components; medical and orthopedic equipment; optics and photography equipment; diagnostics, food and beverages, chemicals, soaps and detergent; and firearm and ammunition suppliers and retailers for purposes of safety and security;

- r. **Transportation.** Airlines, taxis, transportation network providers (such as Uber and Lyft), vehicle rental services, paratransit, marinas, docks, boat storage, and other private, public, and commercial transportation and logistics providers necessary for Essential Activities and other-purposes expressly authorized in this Order;
- s. **Home-based care and services.** Home-based care for adults, seniors, children, and/or people with developmental disabilities, intellectual disabilities, substance use disorders, and/or mental illness, including caregivers such as nannies who may travel to the child's home to provide care, and other in-home services including meal delivery;
- t. **Residential facilities and shelters.** Residential facilities and shelters for adults, seniors, children, pets, and/or people with developmental disabilities, intellectual disabilities, substance use disorders, and/or mental illness;
- u. **Professional services.** Professional services, such as legal services, accounting services, insurance services, real estate services (including appraisal and title services);
- v. **Manufacture, distribution, and supply chain for critical products and industries.** Manufacturing companies, distributors, and supply chain companies producing and supplying essential products and services in and for industries such as pharmaceutical, technology, biotechnology, healthcare, chemicals and sanitization, waste pickup and disposal, agriculture, food and beverage, transportation, energy, steel and steel products, petroleum and fuel, mining, construction, national defense, communications, as well as products used by other Essential Businesses and Operations.
- w. **Critical labor union functions.** Labor Union essential activities including the administration of health and welfare funds and personnel checking on the well-being and safety of members providing services in Essential Businesses and Operations - provided that these checks should be done by telephone or remotely where possible.
- x. **Hotels and motels.** Hotels and motels, to the extent used for lodging and delivery or carry-out food services.
- y. **Funeral services.** Funeral, mortuary, cremation, burial, cemetery, and related services.

13. **Minimum Basic Operations.** For the purposes of this Order, Minimum Basic Operations include the following, provided that employees comply with Social Distancing Requirements, to the extent possible, while carrying out such operations:

- a. The minimum necessary activities to maintain the value of the business's inventory, preserve the condition of the business's physical plant and equipment, ensure security, process payroll and employee benefits, or for related functions.
- b. The minimum necessary activities to facilitate employees of the business being able to continue to work remotely from their residences.

14. **Essential Travel.** For the purposes of this Order, Essential Travel includes travel for any of the following purposes. Individuals engaged in any Essential Travel must comply with all Social Distancing Requirements as defined in this Section.

- a. Any travel related to the provision of or access to Essential Activities, Essential Governmental Functions, Essential Businesses and Operations, or Minimum Basic Operations.

- b. Travel to care for elderly, minors, dependents, persons with disabilities, or other vulnerable persons.
- c. Travel to or from educational institutions for purposes of receiving materials for distance learning, for receiving meals, and any other related services.
- d. Travel to return to a place of residence from outside the jurisdiction.
- e. Travel required by law enforcement or court order, including to transport children pursuant to a custody agreement.
- f. Travel required for non-residents to return to their place of residence outside the State. Individuals are strongly encouraged to verify that their transportation out of the State remains available and functional prior to commencing such travel.

15. Social Distancing Requirements. For purposes of this Order, Social Distancing Requirements includes maintaining at least six-foot social distancing from other individuals, washing hands with soap and water for at least twenty seconds as frequently as possible or using hand sanitizer, covering coughs or sneezes (into the sleeve or elbow, not hands), regularly cleaning high-touch surfaces, and not shaking hands.

- a. **Required measures.** Essential Businesses and Operations and businesses engaged in Minimum Basic Operations must take proactive measures to ensure compliance with Social Distancing Requirements, including where possible:
 - i. **Designate six-foot distances.** Designating with signage, tape, or by other means six-foot spacing for employees and customers in line to maintain appropriate distance;
 - ii. **Hand sanitizer and sanitizing products.** Having hand sanitizer and sanitizing products readily available for employees and customers;
 - iii. **Separate operating hours for vulnerable populations.** Implementing separate operating hours for elderly and vulnerable customers; and
 - iv. **Online and remote access.** Posting online whether a facility is open and how best to reach the facility and continue services by phone or remotely.

16. Intent of this Order. The intent of this Order is to ensure that the maximum number of people self-isolate in their places of residence to the maximum extent feasible, while enabling essential services to continue, to slow the spread of COVID-19 to the greatest extent possible. When people need to leave their places of residence, whether to perform Essential Activities, or to otherwise facilitate authorized activities necessary for continuity of social and commercial life, they should at all times and as much as reasonably possible comply with Social Distancing Requirements. All provisions of this Order should be interpreted to effectuate this intent.

17. Enforcement. This Order may be enforced by State and local law enforcement to the extent set forth in Ohio law. To the extent any public official enforcing this Order has questions regarding what services are prohibited under this Order, the Director of Health hereby delegates to local health departments the authority to answer questions in writing and consistent with this Order.

18. COVID-19 Information and Checklist for Businesses/Employers. Business and employers are to take the following actions:

- a. Allow as many employees as possible to work from home by implementing policies in areas such as teleworking and video conferencing.
- b. Actively encourage sick employees to stay home until they are free of fever (without the use of medication) for at least 72 hours (three full days) AND symptoms have improved for at least 72 hours AND at least seven days have passed since symptoms first began. Do not require a healthcare provider's note to validate the illness or return to work of employees sick with acute respiratory illness; healthcare provider offices and medical facilities may be extremely busy and not able to provide such documentation in a timely way.
- c. Ensure that your sick leave policies are up to date, flexible, and non-punitive to allow sick employees to stay home to care for themselves, children, or other family members. Consider encouraging employees to do a self-assessment each day to check if they have any COVID-19 symptoms (fever, cough, or shortness of breath).
- d. Separate employees who appear to have acute respiratory illness symptoms from other employees and send them home immediately. Restrict their access to the business until they have recovered.
- e. Reinforce key messages — stay home when sick, use cough and sneeze etiquette, and practice hand hygiene — to all employees, and place posters in areas where they are most likely to be seen. Provide protection supplies such as soap and water, hand sanitizer, tissues, and no-touch disposal receptacles for use by employees.
- f. Frequently perform enhanced environmental cleaning of commonly touched surfaces, such as workstations, countertops, railings, door handles, and doorknobs. Use the cleaning agents that are usually used in these areas and follow the directions on the label. Provide disposable wipes so that commonly used surfaces can be wiped down by employees before each use.
- g. Be prepared to change business practices if needed to maintain critical operations (e.g., identify alternative suppliers, prioritize customers, or temporarily suspend some of your operations).

19. No limitation on authority. Nothing in this Order shall, in any way, alter or modify any existing legal authority allowing the State or any local health department from ordering (1) any quarantine or isolation that may require an individual to remain inside a particular residential property or medical facility for a limited period of time, including the duration of this public health emergency, or (2) any closure of a specific location for a limited period of time, including the duration of this public health emergency.

20. Savings clause. If any provision of this Order or its application to any person or circumstance is held invalid by any court of competent jurisdiction, this invalidity does not affect any other provision or application of this Order, which can be given effect without the invalid provision or application. To achieve this purpose, the provisions of this Order are declared to be severable.

21. Previous Orders superseded. This Order supersedes, only to the extent that it conflicts, and amends any previous Order which conflicts with the provisions of this Order.

22. Duration. This Order shall be effective at 11:59 p.m. on March 23, 2020 and remain in full force and effect until 11:59 p.m. on April 6, 2020, unless the Director of the Ohio Department of Health rescinds or modifies this Order at a sooner time and date.

COVID-19 is a respiratory disease that can result in serious illness or death, is caused by the SARS-CoV-2 virus, which is a new strain of coronavirus that had not been previously identified in humans and can easily spread from person to person. The virus is spread between individuals who are in close contact with each other (within about six feet) through respiratory droplets produced when an infected person coughs or sneezes. It may be possible that individuals can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose or eyes.

On January 23, 2020, the Ohio Department of Health issued a Director's Journal-Entry making COVID-19 a Class A reportable disease in Ohio.

On January 28, 2020, the Ohio Department of Health hosted the first statewide call with local health departments and healthcare providers regarding COVID-19.

On January 30, 2020, the International Health Regulations Emergency Committee of the World Health Organization declared the outbreak of COVID-19 a public health emergency of international concern.

On January 31, 2020, Health and Human Services Secretary, Alex M. Azar II, declared a public health emergency for the United States to aid the nation's healthcare community in responding to COVID-19.

On February 1, 2020, the Ohio Department of Health issued a statewide Health Alert Network to provide local health departments and healthcare providers with updated guidance for COVID-19 and revised Person Under Investigation (PUI) criteria.

On February 3, 2020, the Ohio Department of Health trained over 140 personnel to staff a call center for COVID-19, in the event it was needed.

On February 5, 2020, the Ohio Department of Health began updating and notifying the media of the number of PUIs in Ohio every Tuesday and Thursday.

On February 6, 2020, the Ohio Department of Health updated all agency assistant directors and chiefs of staff on COVID-19 preparedness and status during the Governor's cabinet meeting.

On February 7, 2020, the Ohio Department of Health and the Ohio Emergency Management Agency met to conduct advance planning for COVID-19.

On February 13, 2020, the Ohio Department of Health conducted a Pandemic Tabletop Exercise with State agencies to review responsive actions should there be a pandemic in Ohio.

On February 14, 2020, the Ohio Department of Health held a conference call with health professionals across the state. The purpose of the call was to inform and engage the healthcare community in Ohio. Presentations were provided by the Department of Health, Hamilton County Public Health, and the Ohio State University.

On February 27, 2020, the Ohio Department of Health and the Ohio Emergency Management Agency briefed the directors of State agencies during the Governor's cabinet meeting regarding preparedness and the potential activation of the Emergency Operations Center.

On February 28, 2020, the "Governor DeWine, Health Director Update COVID-19 Prevention and Preparedness Plan" was sent to a broad range of associations representing healthcare, dental, long-term care, K-12 schools, colleges and universities, business, public transit, faith-based organizations, non-profit organizations, and local governments.

On March 2, 2020, the Ohio Department of Health activated a Joint Information Center to coordinate COVID-19 communications.

On March 5, 2020, the Ohio Department of Health hosted the Governor's Summit on COVID-19 Preparedness, a meeting with the Governor, cabinet agency directors, local health department commissioners, and their staff.

On March 6, 2020, the Ohio Department of Health opened a call center to answer questions from the public regarding COVID-19.

On March 9, 2020, testing by the Department of Health confirmed that three (3) patients were positive for COVID-19 in the State of Ohio. This confirms the presence of a potentially dangerous condition which may affect the health, safety and welfare of citizens of Ohio.

On March 9, 2020, the Ohio Emergency Management Agency activated the Emergency Operations Center.

On March 9, 2020, the Governor Declared a State of Emergency in Executive Order 2020-01D.

On March 11, 2020, the head of the World Health Organization declared COVID-19 a pandemic.

On March 11, 2020, testing by the Ohio Department of Health confirmed that one (1) more patient was positive for COVID-19 in the State of Ohio.

On March 11, 2020, the Ohio Departments of Health and Veterans Services issued a Joint Directors' Order to limit access to Ohio nursing homes and similar facilities.

On March 15, 2020, the Ohio Department of Health issued a Director's Order to limit access to Ohio's jails and detention facilities.

On March 15, 2020, the Ohio Department of Health issued a Director's Order to limit the sale of food and beverages, liquor, beer and wine to carry-out and delivery only.

On March 15, 2020, the CDC issued Interim Guidance for mass gatherings or large community events, stating that such events that consist of 50 or more people should be cancelled or postponed.

On March 16, 2020 the Ohio Department of Health issued a Director's Order closing polling locations for the March 17, 2020 primary election.

On March 17, 2020 the Ohio Department of Health issued a Director's Order for the management of non-essential surgeries and procedures throughout Ohio.

On March 17, 2020 the Ohio Department of Health issued an Amended Director's Order to limit and/or prohibit mass gatherings and the closure of venues in the State of Ohio.

On March 19, 2020, the Ohio Department of Health issued a Director's Order closing hair salons, nail salons, barber shops, tattoo parlors, body piercing locations, and massage therapy locations.

Multiple areas of the United States are experiencing "community spread" of the virus that causes COVID-19. Community spread, defined as the transmission of an illness for which the source is unknown, means that isolation of known areas of infection is no longer enough to control spread.

The CDC reports that people are most contagious when they are most symptomatic (the sickest) however some spread might be possible before people show symptoms although that is not the main way the virus spreads.

Mass gatherings (10 or more persons) increase the risk of community transmission of the virus COVID-19.

Accordingly, to avoid an imminent threat with a high probability of widespread exposure to COVID-19 with a significant risk of substantial harm to a large number of people in the general population, including the elderly and people with weakened immune systems and chronic medical conditions, I hereby **ORDER** effective at 11:59 p.m. on March 23, 2020, all persons are to stay at home or their place of residence unless they are engaged in Essential Activities, Essential Governmental Functions, or to operate Essential Businesses and Operations as set forth in this Order. This Order shall remain in full force and effect until 11:59 p.m. on April 6, 2020, unless the Director of the Ohio Department of Health rescinds or modifies this Order at a sooner time and date. To the extent any public official enforcing this Order has questions regarding what services are prohibited under this Order, the Director of Health hereby delegates to local health departments the authority to answer questions in writing and consistent with this Order.

March 22, 2020

Amy Acton, MD, MPH
Director of Health

U.S. Department of Homeland Security
Cybersecurity & Infrastructure Security Agency
Office of the Director
Washington, DC 20528



March 19, 2020

MEMORANDUM ON IDENTIFICATION OF ESSENTIAL CRITICAL INFRASTRUCTURE WORKERS DURING COVID-19 RESPONSE

FROM: Christopher C. Krebs
Director
Cybersecurity and Infrastructure Security Agency (CISA)

A handwritten signature of Christopher C. Krebs is placed over the text above.

As the Nation comes together to slow the spread of COVID-19, on March 16th, the President issued updated Coronavirus Guidance for America. This guidance states that:

"If you work in a critical infrastructure industry, as defined by the Department of Homeland Security, such as healthcare services and pharmaceutical and food supply, you have a special responsibility to maintain your normal work schedule."

The Cybersecurity and Infrastructure Security Agency (CISA) executes the Secretary of Homeland Security's responsibilities as assigned under the Homeland Security Act of 2002 to provide strategic guidance, promote a national unity of effort, and coordinate the overall federal effort to ensure the security and resilience of the Nation's critical infrastructure. CISA uses trusted partnerships with both the public and private sectors to deliver infrastructure resilience assistance and guidance to a broad range of partners.

In accordance with this mandate, and in collaboration with other federal agencies and the private sector, CISA developed an initial list of "Essential Critical Infrastructure Workers" to help State and local officials as they work to protect their communities, while ensuring continuity of functions critical to public health and safety, as well as economic and national security. The list can also inform critical infrastructure community decision-making to determine the sectors, sub-sectors, segments, or critical functions that should continue normal operations, appropriately modified to account for Centers for Disease Control (CDC) workforce and customer protection guidance.

The attached list identifies workers who conduct a range of operations and services that are essential to continued critical infrastructure viability, including staffing operations centers, maintaining and repairing critical infrastructure, operating call centers, working construction, and performing management functions, among others. The industries they support represent, but are not necessarily limited to, medical and healthcare, telecommunications, information technology systems, defense, food and agriculture, transportation and logistics, energy, water and wastewater, law enforcement, and public works.

We recognize that State, local, tribal, and territorial governments are ultimately in charge of implementing and executing response activities in communities under their jurisdiction, while the Federal Government is in a supporting role. As State and local communities consider COVID-19-related restrictions, CISA is offering this list to assist prioritizing activities related to continuity of operations and incident response, including the appropriate movement of critical infrastructure workers within and between jurisdictions.

Accordingly, this list is advisory in nature. It is not, nor should it be considered to be, a federal directive or standard in and of itself.

In addition, these identified sectors and workers are not intended to be the authoritative or exhaustive list of critical infrastructure sectors and functions that should continue during the COVID-19 response. Instead, State and local officials should use their own judgment in using their authorities and issuing implementation directives and guidance. Similarly, critical infrastructure industry partners will use their own judgment, informed by this list, to ensure continued operations of critical infrastructure services and functions. All decisions should appropriately balance public safety while ensuring the continued delivery of critical infrastructure services and functions.

CISA will continue to work with you and our partners in the critical infrastructure community to update this list as the Nation's response to COVID-19 evolves. We also encourage you to submit how you might use this list so that we can develop a repository of use cases for broad sharing across the country.

Should you have questions about this list, please contact CISA at CISA.CAT@cisa.dhs.gov.

Attachment: "Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response"



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DEFEND TODAY. SECURE TOMORROW



Guidance on the Essential Critical Infrastructure Workforce: Ensuring Community and National Resilience in COVID-19 Response

Version 1.0 (March 19, 2020)

THE IMPORTANCE OF ESSENTIAL CRITICAL INFRASTRUCTURE WORKERS

Functioning critical infrastructure is imperative during the response to the COVID-19 emergency for both public health and safety as well as community well-being. Certain critical infrastructure industries have a special responsibility in these times to continue operations.

This guidance and accompanying list are intended to support State, Local, and industry partners in identifying the critical infrastructure sectors and the essential workers needed to maintain the services and functions Americans depend on daily and that need to be able to operate resiliently during the COVID-19 pandemic response.

This document gives guidance to State, local, tribal, and territorial jurisdictions and the private sector on defining essential critical infrastructure workers. Promoting the ability of such workers to continue to work during periods of community restriction, access management, social distancing, or closure orders/directives is crucial to community resilience and continuity of essential functions.

CONSIDERATIONS FOR GOVERNMENT AND BUSINESS

This list was developed in consultation with federal agency partners, industry experts, and State and local officials, and is based on several key principles:

1. Response efforts to the COVID-19 pandemic are locally executed, State managed, and federally supported
2. Everyone should follow guidance from the CDC, as well as State and local government officials, regarding strategies to limit disease spread.
3. Workers should be encouraged to work remotely when possible and focus on core business activities. In-person, non-mandatory activities should be delayed until the resumption of normal operations.
4. When continuous remote work is not possible, businesses should enlist strategies to reduce the likelihood of spreading the disease. This includes, but is not necessarily limited to, separating staff by off-setting shift hours or days and/or social distancing. These steps can preserve the workforce and allow operations to continue.

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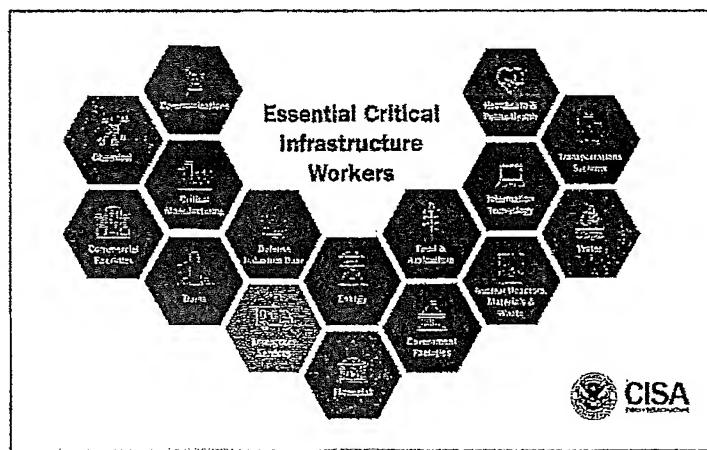
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Essential Critical Infrastructure Workforce

5. All organizations should implement their business continuity and pandemic plans, or put plans in place if they do not exist. Delaying implementation is not advised and puts at risk the viability of the business and the health and safety of the employees.
6. In the modern economy, reliance on technology and just-in-time supply chains means that certain workers must be able to access certain sites, facilities, and assets to ensure continuity of functions.
7. Government employees, such as emergency managers, and the business community need to establish and maintain lines of communication.
8. When government and businesses engage in discussions about critical infrastructure workers, they need to consider the implications of business operations beyond the jurisdiction where the asset or facility is located. Businesses can have sizeable economic and societal impacts as well as supply chain dependencies that are geographically distributed.
9. Whenever possible, jurisdictions should align access and movement control policies related to critical infrastructure workers to lower the burden of workers crossing jurisdictional boundaries.

IDENTIFYING ESSENTIAL CRITICAL INFRASTRUCTURE WORKERS

The following list of sectors and identified essential critical infrastructure workers are an initial recommended set and are intended to be overly inclusive reflecting the diversity of industries across the United States. CISA will continually solicit and accept feedback on the list (both sectors/sub sectors and identified essential workers) and will evolve the list in response to stakeholder feedback. We will also use our various stakeholder engagement mechanisms to work with partners on how they are using this list and share those lessons learned and best practices broadly. We ask that you share your feedback, both positive and negative on this list so we can provide the most useful guidance to our critical infrastructure partners. Feedback can be sent to CISA.CAT@cisa.dhs.gov.



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HEALTHCARE / PUBLIC HEALTH

- Workers providing COVID-19 testing; Workers that perform critical clinical research needed for COVID-19 response
- Caregivers (e.g., physicians, dentists, psychologists, mid-level practitioners, nurses and assistants, infection control and quality assurance personnel, pharmacists, physical and occupational therapists and assistants, social workers, speech pathologists and diagnostic and therapeutic technicians and technologists)
- Hospital and laboratory personnel (including accounting, administrative, admitting and discharge, engineering, epidemiological, source plasma and blood donation, food service, housekeeping, medical records, information technology and operational technology, nutritionists, sanitarians, respiratory therapists, etc.)
- Workers in other medical facilities (including Ambulatory Health and Surgical, Blood Banks, Clinics, Community Mental Health, Comprehensive Outpatient rehabilitation, End Stage Renal Disease, Health Departments, Home Health care, Hospices, Hospitals, Long Term Care, Organ Pharmacies, Procurement Organizations, Psychiatric Residential, Rural Health Clinics and Federally Qualified Health Centers)
- Manufacturers, technicians, logistics and warehouse operators, and distributors of medical equipment, personal protective equipment (PPE), medical gases, pharmaceuticals, blood and blood products, vaccines, testing materials, laboratory supplies, cleaning, sanitizing, disinfecting or sterilization supplies, and tissue and paper towel products
- Public health / community health workers, including those who compile, model, analyze and communicate public health information
- Blood and plasma donors and the employees of the organizations that operate and manage related activities
- Workers that manage health plans, billing, and health information, who cannot practically work remotely
- Workers who conduct community-based public health functions, conducting epidemiologic surveillance, compiling, analyzing and communicating public health information, who cannot practically work remotely
- Workers performing cybersecurity functions at healthcare and public health facilities, who cannot practically work remotely
- Workers conducting research critical to COVID-19 response
- Workers performing security, incident management, and emergency operations functions at or on behalf of healthcare entities including healthcare coalitions, who cannot practically work remotely
- Workers who support food, shelter, and social services, and other necessities of life for economically disadvantaged or otherwise needy individuals, such as those residing in shelters
- Pharmacy employees necessary for filling prescriptions
- Workers performing mortuary services, including funeral homes, crematoriums, and cemetery workers
- Workers who coordinate with other organizations to ensure the proper recovery, handling, identification, transportation, tracking, storage, and disposal of human remains and personal effects; certify cause of death; and facilitate access to mental/behavioral health services to the family members, responders, and survivors of an incident

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Essential Critical Infrastructure Workforce

LAW ENFORCEMENT, PUBLIC SAFETY, FIRST RESPONDERS

- Personnel in emergency management, law enforcement, Emergency Management Systems, fire, and corrections, including front line and management
- Emergency Medical Technicians
- 911 call center employees
- Fusion Center employees
- Hazardous material responders from government and the private sector.
- Workers – including contracted vendors – who maintain digital systems infrastructure supporting law enforcement and emergency service operations.

FOOD AND AGRICULTURE

- Workers supporting groceries, pharmacies and other retail that sells food and beverage products
- Restaurant carry-out and quick serve food operations - Carry-out and delivery food employees
- Food manufacturer employees and their supplier employees—to include those employed in food processing (packers, meat processing, cheese plants, milk plants, produce, etc.) facilities; livestock, poultry, seafood slaughter facilities; pet and animal feed processing facilities; human food facilities producing by-products for animal food; beverage production facilities; and the production of food packaging
- Farm workers to include those employed in animal food, feed, and ingredient production, packaging, and distribution; manufacturing, packaging, and distribution of veterinary drugs; truck delivery and transport; farm and fishery labor needed to produce our food supply domestically
- Farm workers and support service workers to include those who field crops; commodity inspection; fuel ethanol facilities; storage facilities; and other agricultural inputs
- Employees and firms supporting food, feed, and beverage distribution, including warehouse workers, vendor-managed inventory controllers and blockchain managers
- Workers supporting the sanitation of all food manufacturing processes and operations from wholesale to retail
- Company cafeterias - in-plant cafeterias used to feed employees
- Workers in food testing labs in private industries and in institutions of higher education
- Workers essential for assistance programs and government payments
- Employees of companies engaged in the production of chemicals, medicines, vaccines, and other substances used by the food and agriculture industry, including pesticides, herbicides, fertilizers, minerals, enrichments, and other agricultural production aids
- Animal agriculture workers to include those employed in veterinary health; manufacturing and distribution of animal medical materials, animal vaccines, animal drugs, feed ingredients, feed, and bedding, etc.; transportation of live animals, animal medical materials; transportation of deceased animals for disposal; raising of animals for food; animal production operations; slaughter and packing plants and associated regulatory and government workforce
- Workers who support the manufacture and distribution of forest products, including, but not limited to timber, paper, and other wood products
- Employees engaged in the manufacture and maintenance of equipment and other infrastructure necessary to agricultural production and distribution

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Essential Critical Infrastructure Workforce

ENERGY

Electricity industry:

- Workers who maintain, ensure, or restore the generation, transmission, and distribution of electric power, including call centers, utility workers, reliability engineers and fleet maintenance technicians
- Workers needed for safe and secure operations at nuclear generation
- Workers at generation, transmission, and electric blackstart facilities
- Workers at Reliability Coordinator (RC), Balancing Authorities (BA), and primary and backup Control Centers (CC), including but not limited to independent system operators, regional transmission organizations, and balancing authorities
- Mutual assistance personnel
- IT and OT technology staff – for EMS (Energy Management Systems) and Supervisory Control and Data Acquisition (SCADA) systems, and utility data centers; Cybersecurity engineers; cybersecurity risk management
- Vegetation management crews and traffic workers who support
- Environmental remediation/monitoring technicians
- Instrumentation, protection, and control technicians

Petroleum workers:

- Petroleum product storage, pipeline, marine transport, terminals, rail transport, road transport
- Crude oil storage facilities, pipeline, and marine transport
- Petroleum refinery facilities
- Petroleum security operations center employees and workers who support emergency response services
- Petroleum operations control rooms/centers
- Petroleum drilling, extraction, production, processing, refining, terminal operations, transporting, and retail for use as end-use fuels or feedstocks for chemical manufacturing
- Onshore and offshore operations for maintenance and emergency response
- Retail fuel centers such as gas stations and truck stops, and the distribution systems that support them

Natural and propane gas workers:

- Natural gas transmission and distribution pipelines, including compressor stations
- Underground storage of natural gas
- Natural gas processing plants, and those that deal with natural gas liquids
- Liquefied Natural Gas (LNG) facilities
- Natural gas security operations center, natural gas operations dispatch and control rooms/centers natural gas emergency response and customer emergencies, including natural gas leak calls
- Drilling, production, processing, refining, and transporting natural gas for use as end-use fuels, feedstocks for chemical manufacturing, or use in electricity generation
- Propane gas dispatch and control rooms and emergency response and customer emergencies, including propane leak calls
- Propane gas service maintenance and restoration, including call centers

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Essential Critical-Infrastructure Workforce

- Processing, refining, and transporting natural liquids, including propane gas, for use as end-use fuels or feedstocks for chemical manufacturing
- Propane gas storage, transmission, and distribution centers

WATER AND WASTEWATER

Employees needed to operate and maintain drinking water and wastewater/drainage infrastructure, including:

- Operational staff at water authorities
- Operational staff at community water systems
- Operational staff at wastewater treatment facilities
- Workers repairing water and wastewater conveyances and performing required sampling or monitoring
- Operational staff for water distribution and testing
- Operational staff at wastewater collection facilities
- Operational staff and technical support for SCADA Control systems
- Chemical disinfectant suppliers for wastewater and personnel protection
- Workers that maintain digital systems infrastructure supporting water and wastewater operations

TRANSPORTATION AND LOGISTICS

- Employees supporting or enabling transportation functions, including dispatchers, maintenance and repair technicians, warehouse workers, truck stop and rest area workers, and workers that maintain and inspect infrastructure (including those that require cross-border travel)
- Employees of firms providing services that enable logistics operations, including cooling, storing, packaging, and distributing products for wholesale or retail sale or use.
- Mass transit workers
- Workers responsible for operating dispatching passenger, commuter and freight trains and maintaining rail infrastructure and equipment
- Maritime transportation workers - port workers, mariners, equipment operators
- Truck drivers who haul hazardous and waste materials to support critical infrastructure, capabilities, functions, and services
- Automotive repair and maintenance facilities
- Manufacturers and distributors (to include service centers and related operations) of packaging materials, pallets, crates, containers, and other supplies needed to support manufacturing, packaging staging and distribution operations
- Postal and shipping workers, to include private companies
- Employees who repair and maintain vehicles, aircraft, rail equipment, marine vessels, and the equipment and infrastructure that enables operations that encompass movement of cargo and passengers
- Air transportation employees, including air traffic controllers, ramp personnel, aviation security, and aviation management
- Workers who support the maintenance and operation of cargo by air transportation, including flight crews, maintenance, airport operations, and other on- and off- airport facilities workers

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Essential Critical Infrastructure Workforce

PUBLIC WORKS

- Workers who support the operation, inspection, and maintenance of essential dams, locks and levees
- Workers who support the operation, inspection, and maintenance of essential public works facilities and operations, including bridges, water and sewer main breaks, fleet maintenance personnel, construction of critical or strategic infrastructure, traffic signal maintenance, emergency location services for buried utilities, maintenance of digital systems infrastructure supporting public works operations, and other emergent issues
- Workers such as plumbers, electricians, exterminators, and other service providers who provide services that are necessary to maintaining the safety, sanitation, and essential operation of residences
- Support, such as road and line clearing, to ensure the availability of needed facilities, transportation, energy and communications
- Support to ensure the effective removal, storage, and disposal of residential and commercial solid waste and hazardous waste

COMMUNICATIONS AND INFORMATION TECHNOLOGY

Communications:

- Maintenance of communications infrastructure- including privately owned and maintained communication systems- supported by technicians, operators, call-centers, wireline and wireless providers, cable service providers, satellite operations, undersea cable landing stations, Internet Exchange Points, and manufacturers and distributors of communications equipment
- Workers who support radio, television, and media service, including, but not limited to front line news reporters, studio, and technicians for newsgathering and reporting
- Workers at Independent System Operators and Regional Transmission Organizations, and Network Operations staff, engineers and/or technicians to manage the network or operate facilities
- Engineers, technicians and associated personnel responsible for infrastructure construction and restoration, including contractors for construction and engineering of fiber optic cables
- Installation, maintenance and repair technicians that establish, support or repair service as needed
- Central office personnel to maintain and operate central office, data centers, and other network office facilities
- Customer service and support staff, including managed and professional services as well as remote providers of support to transitioning employees to set up and maintain home offices, who interface with customers to manage or support service environments and security issues, including payroll, billing, fraud, and troubleshooting
- Dispatchers involved with service repair and restoration

Information Technology:

- Workers who support command centers, including, but not limited to Network Operations Command Center, Broadcast Operations Control Center and Security Operations Command Center
- Data center operators, including system administrators, HVAC & electrical engineers, security personnel, IT managers, data transfer solutions engineers, software and hardware engineers, and database administrators
- Client service centers, field engineers, and other technicians supporting critical infrastructure, as well as

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Essential Critical Infrastructure Workforce

- manufacturers and supply chain vendors that provide hardware and software, and information technology equipment (to include microelectronics and semiconductors) for critical infrastructure
- Workers responding to cyber incidents involving critical infrastructure, including medical facilities, SLTT governments and federal facilities, energy and utilities, and banks and financial institutions, and other critical infrastructure categories and personnel
- Workers supporting the provision of essential global, national and local infrastructure for computing services (incl. cloud computing services), business infrastructure, web-based services, and critical manufacturing
- Workers supporting communications systems and information technology used by law enforcement, public safety, medical, energy and other critical industries
- Support required for continuity of services, including janitorial/cleaning personnel

OTHER COMMUNITY-BASED GOVERNMENT OPERATIONS AND ESSENTIAL FUNCTIONS

- Workers to ensure continuity of building functions
- Security staff to maintain building access control and physical security measures
- Elections personnel
- Federal, State, and Local, Tribal, and Territorial employees who support Mission Essential Functions and communications networks
- Trade Officials (FTA negotiators; international data flow administrators)
- Weather forecasters
- Workers that maintain digital systems infrastructure supporting other critical government operations
- Workers at operations centers necessary to maintain other essential functions
- Workers who support necessary credentialing, vetting and licensing operations for transportation workers
- Customs workers who are critical to facilitating trade in support of the national emergency response supply chain
- Educators supporting public and private K-12 schools, colleges, and universities for purposes of facilitating distance learning or performing other essential functions, if operating under rules for social distancing
- Hotel Workers where hotels are used for COVID-19 mitigation and containment measures

CRITICAL MANUFACTURING

- Workers necessary for the manufacturing of materials and products needed for medical supply chains, transportation, energy, communications, food and agriculture, chemical manufacturing, nuclear facilities, the operation of dams, water and wastewater treatment, emergency services, and the defense industrial base.

HAZARDOUS MATERIALS

- Workers at nuclear facilities, workers managing medical waste, workers managing waste from pharmaceuticals and medical material production, and workers at laboratories processing test kits
- Workers who support hazardous materials response and cleanup
- Workers who maintain digital systems infrastructure supporting hazardous materials management operations

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Cincinnati Police Department @CincyPD · Jun 1

Several arrests in the area earlier at McMicken & Stonewall. An @Enquirer reporter was temporarily detained & @WCPO reporter moved from the immediate area as officers were attempting to clear the street while having rocks thrown at them. We apologize for any inconvenience.

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John Cranley @JohnCranley · Jun 1

@Enquirer @BusinessCourier @FOX19 @WCPO @wkrc @wlwt @917wvxu @wiw @CityBeatCincy

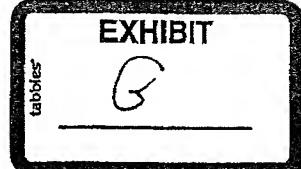
Statement from Mayor John Cranley

"The Police are working very hard to enforce the curfew and keep everyone safe, including the media. The arrest of an Enquirer reporter was a big mistake. He has been released. Chief Isaac has reaffirmed the right of the press to cover our police. The buck stops with me and I sincerely apologize. The right to a free press

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Statement from Mayor John Cranley

"The Police are working very hard to enforce the curfew and keep everyone safe, including the media. The arrest of an Enquirer reporter was a big mistake. He has been released. Chief Isaac has reaffirmed the right of the press to cover our police. The buck stops with me and I sincerely apologize. The right to a free press and to protest are inextricably intertwined. Reporters are crucial to our democracy."

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